United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

No. 20,730

415

CHARLES F. WARE, *Appellant,*

v.

PAUL H. PRESTON, ET. AL., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

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THOMAS LUMBARD,
WILLIAM M. COHEN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellees, the following questions are presented:

1) Was the petition for a writ of habeas corpus properly denied without a hearing on the basis that 28 U.S.C. § 2255 provides an adequate and effective remedy for collaterally attacking a final judgment of conviction?

2) Where a trial is held after *Blue,* and no attempt is made to remedy the absence of appointed counsel prior to trial, *Blue* is relied on at trial to support the exclusion of admissions made at the preliminary hearing, which were not admitted at trial, and no issue is raised on direct appeal concerning defects in the preliminary hearing, may the absence of appointed counsel at preliminary hearing be raised for the first time as grounds for collaterally attacking a final conviction?

3) Assuming the right to counsel at preliminary hearing is now determined to rest on constitutional grounds, instead of the statutory grounds enumerated in *Blue,* should that right be applied retroactively in a collateral proceeding to vacate a judgment of conviction finalized prior to the announcement of the new constitutional right?

4) Was appellant prejudiced by his voluntary admissions made under oath before a judicial officer at his preliminary hearing after repeated warnings by the judicial officer of the possible consequences of his testimony, where appellant was not represented by appointed counsel at said hearing, and where these admissions were not introduced into evidence at trial for any purpose?

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OTHER REFERENCES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

History of the Case

On February 24, 1966, appellant was permitted by Judge Sirica to file *in forma pauperis* a *pro se* petition for a writ of *habeas corpus* (H.C. No. 95-66) in which he sought to collaterally attack his 1965 conviction for violations of the Federal narcotics laws (26 U.S.C. §§ 4704(a), 4705(a)). As grounds for relief, appellant alleged that he was not advised by the United States Commissioner of his right to have counsel appointed to represent him at his preliminary hearing and that his testimony at the preliminary hearing without the aid and advice of counsel rendered his subsequent conviction in Criminal Case No. 596-64 null and void. Following receipt of appellees' Return and Answer to the Rule to Show Cause issued by Judge Sirica, the court below denied issuance of the writ without a

hearing. It is from that denial that Ware presently appeals.

Appellant was indicted on June 29, 1964, on three counts charging violations of the Federal narcotics laws (26 U.S.C. §§ 4704(a), 4705(a); 21 U.S.C. § 174). After trial by a jury before Judge Pine on January 28 and February 1, 1965, appellant was convicted of counts 1 and 2 of the indictment and acquitted on count 3. During the course of the trial, the government sought to introduce into evidence admissions made by appellant in his sworn testimony before the United States Commissioner at his preliminary hearing held on May 12, 1964 (Tr. 95-96).[1] Appellant, relying on *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965), sought to exclude these admissions on the basis that appellant had not been advised of his right to appointed counsel at his preliminary hearing and that had counsel been appointed he would have advised appellant not to testify at the hearing (Tr. 132-38). A lengthy *voir dire* examination was conducted outside the presence of the jury at which United States Commissioner for the District of Columbia, Mr. Sam Wertleb and appellant testified as to what transpired at the hearing (Tr. 101-30). Thereafter, the government withdrew its proffer of these admissions and they were not before the jury at any point during the trial (Tr. 148).

On appeal from his conviction, appellant did not raise the denial of his right to counsel at preliminary hearing or the effect of the admissions on his trial. This Court affirmed his conviction by opinion on November 3, 1965. *Ware* v. *United States*, 123 U.S. App. D.C. 34, 356 F.2d 787 (1965), *cert. denied*, 383 U.S. 919 (1966).

Thereafter, on January 21, 1966, appellant filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255, alleging as grounds for the relief sought that the Commissioner had not informed him of his right to appointed counsel at the preliminary hearing and that the statements made by

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[1] "Tr." refers to the transcript of the trial in Criminal Case No. 596-64.

him at the hearing without counsel adversely affected his ability to defend himself at trial (Civil Action No. 161-66).[2] The government filed a written opposition to this motion, contending, *inter alia*, that the appellant, having failed on direct appeal to raise any issue with respect to defects at his preliminary hearing and their effect, if any, on his trial, is precluded from raising such issues for the first time on collateral attack. On February 10, 1966, Judge Pine denied this motion on the basis that "the motion, files and records conclusively show that [appellant] is entitled to no relief * * *." Leave to appeal *in forma pauperis* was denied by Judge Pine on February 17, 1966. No effort was made by appellant to appeal Judge Pine's decision to this Court.

Instead, on February 24, 1966, appellant filed the petition for a writ of habeas corpus involved in the instant case (H.C. No. 95-66) in which he made virtually the same allegations he asserted in Civil Action 161-66. In its Return and Answer the government argued that a motion to vacate sentence pursuant to Section 2255 was the appropriate remedy for collaterally attacking a Federal criminal conviction, and, in addition, informed appellant that an application for leave to appeal in this Court from denial of his motion in Civil Action No. 161-66 could still be made by him. Judge Sirica denied the issuance of the writ in this case on March 10, 1966, and denied leave to appeal *in forma pauperis* on March 16, 1966. However, on July 7, 1966, this Court granted appellant leave to appeal without prepayment of costs.

Notwithstanding these prior § 2255 and habeas corpus proceedings, on April 18, 1966, appellant filed a second motion to vacate sentence, pursuant to Section 2255, in which he again alleged the same grounds for relief asserted in Civil Action No. 161-66 and H.C. No. 95-66

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[2] The records in Civil Action Nos. 161-66 and 1005-66 are not included in the official record on appeal in the instant case. However, this Court may take judicial notice of the files and records of the United States District Court for the District of Columbia. See *Funk* v. *Commissioner*, 163 F.2d 796 801 n.6 (3rd Cir. 1947).

(Civil Action No. 1005-66). The government again filed a written opposition to appellant's motion. On May 18, 1966, Judge Pine denied the motion on the basis that "the motions, files and records conclusively show that [appellant] is entitled to no relief * * *." Leave to appeal without prepayment of costs was denied by Judge Pine on May 31, 1966, and appellant again took no further action to appeal this decision.

Preliminary Hearing and Trial

On May 8, 1964, appellant was arrested pursuant to a United States Commissioner's arrest warrant which charged him with unlawfully possessing and selling heroin in violation of 26 U.S.C. §§ 4704(a), 4705(a). The warrant had been issued by the Commissioner on May 7, on the basis of a complaint sworn to by Private William L. Hampton, Narcotics Squad, Metropolitan Police Department which stated that "about 10:30 P.M. on April 29, 1964 while in the 1100 block of New Jersey Avenue, N.W., Washington, D.C. the defendant Ware along with Lovett Powell sold five capsules of heroin to Private William L. Hampton for which the officer paid $7.00 in MPCD advance funds."[3] Appellant, along with Powell, was brought before Commissioner Wertleb on May 8, whereupon he was advised of the complaint against him and his right to have a preliminary hearing and to retain counsel. He was further advised that at a preliminary hearing either he or his attorney could cross-examine any witnesses against him and could introduce evidence in his own behalf. The Commissioner also advised appellant that he was not required to make any statement relative to the charge, and that any statement made by him might be used against him. (Commissioner's Record of Proceedings, C.D. 13-80; Tr. 107-08.)

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[3] The warrant and complaint along with the Commissioner's Record of Proceedings are part of the Commissioner's Docket No. 13, Case No. 80, *United States* v. *Ware* (hereinafter referred to as C.D. 13-80) filed as part of the record in Criminal Case No. 596-64 on May 14, 1964, which is included in the supplemental record on appeal. The Commissioner's Record of Proceedings in *United States* v. *Powell*, Commissioner's Docket No. 13, Case No. 79 (hereinafter referred to as C.D. 13-79) is also included in that record.

At the *voir dire* hearing at trial on the admissibility of appellant's statements made at the preliminary hearing, Commissioner Wertleb testified that the following also took place on May 8, 1964:

> * * * I told him [appellant] then that he had a choice. He could have a hearing then and there, that he could waive the hearing, or I would be glad to continue the hearing to give him an opportunity to obtain counsel, or give him an opportunity to obtain counsel from his family, and I asked him what choice did he wish to make. At that time he said he'd like to have a hearing then and there. (Tr. 108).[4]

However, at the government's request the case was continued to May 12, 1964, to allow the government an opportunity to bring in Officer Hampton (Tr. 108-09).

On May 12, the Commissioner again inquired of appellant and Powell "what they wanted to do, and they said they would like to have a hearing then and there" (Tr. 110). Officer Hampton testified on behalf of the government and was cross-examined by both appellant and Powell (Tr. 111). The essence of the officer's testimony was recorded by the Commissioner in his Record of Proceedings.[5]

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[4] Commissioner's Record of Proceedings, C.D. 13-80 contains this note for May 8, 1964: "Defendant [Ware] requests hearing now * * * Case Ctd. to May 12, req. of Govt. to bring in necessary witness."

[5] C.D. 13-80. The Commissioner's notes for the May 12 hearing are as follows:

> Hearing held as requested by Def. Witness Hampton testified that on April 29, 1964 about 10 p.m. he met with one Lovett Powell who got into his car and he drove and picked up Def. Ware as requested by Powell; that while Powell got out to go into a drug store, that Def. Ware asked him if he was looking and he said yes; that when Powell returned to the car they drove to the 1100 Block of N.J. Ave., N.W. at which point Ware asked him how many and he replied—five; that Ware handed him five capsules out of a tube; that he gave the $7.00 for these capsules to Powell as directed by Ware; that Ware and Powell then left his car; that at home, he made a preliminary field test on a portion of the white powder in one of the capsules and the test was positive by color reaction for the presence of a narcotic alkaloid of the opiate group.
>
> Probable cause shown.

At this point, without invitation or request by the Commissioner, appellant "stated that he wished to testify" (Tr. 112, 122). The Commissioner twice advised Ware that he had a right not to testify and that if he did, the testimony could be used against him (Tr. 112, 122). Ware was further cautioned: "Of course, you don't have an attorney present, and it might not be wise for you to testify without an attorney" (Tr. 122). Despite these warnings, appellant "insisted" on testifying on behalf of Powell (Tr. 112, 122). Appellant was sworn, and the Commissioner inquired. "Now what is it you want to tell us about this?" Appellant made certain statements, and was cross-examined by an Assistant United States Attorney. (Tr. 113, 114). The substance of appellant's statements was recorded by the Commissioner in his Record of Proceedings.[6]

At the trial *voir dire*, Commissioner Wertleb testified that appellant stated "that as far as any passing of money was concerned to Mr. Powell, he didn't recall that such a thing took place, but if it did take place, that Powell didn't know anything about the sale that was involved, and that if he did it, it could have been strictly as a matter of convenience" (Tr. 114). On cross-examination appellant further related that he had known Powell for about a week and a half and that Powell had helped him to get a job. He admitted that he passed the narcotics to Officer Hampton, but he stated that at the time the transaction took place Powell had gone into the drug store to get some needles, and he, Ware, received the money from Hampton. (Tr. 115).

Appellant testified at the *voir dire* that the Commissioner's testimony was substantially correct (Tr. 130).

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[6] The Commissioner's notes in C.D. 13-80 state: "Def. Ware—after two additional warnings in re his constitutional rights choice [sic] to testify solely as a witness for co-def.—Powell." In the Record of Proceedings in C.D. 13-79 his notes state: "Witness Ware—after being twice re-advised of his rights testified for Def. Powell that Powell did not know anything about this sale and if it took place and if Powell took any money it was merely as a convenience because of where he sat in the auto."

The Commissioner's Records of Proceedings, the arrest warrants and complaints in appellant's and Powell's cases, C.D. 13-79, 80, were filed in the District Court record of Criminal Case No. 596-64 on May 14, 1964. Following indictment, attorney William J. Rowan was appointed to represent appellant on July 1, 1964, and Mr. Rowan appeared with appellant at his arraignment on July 10. On December 1, 1964 appellant, through counsel, filed a Motion to Dismiss Prospective Jury Panel, which motion was heard and denied by Judge Holtzoff on December 18. No attempt was made prior to trial to correct any possible defects in appellant's preliminary hearing.

At trial, Officer Hampton gave essentially the same testimony as that recorded by the Commissioner at the preliminary hearing (Tr. 25-36).[7] On cross-examination, appellant's counsel attempted to show that Officer Hampton induced or entrapped appellant into selling him narcotics. Counsel made it clear at a bench conference that the defense was not raising any issue as to whether appellant had sold narcotics to Hampton, but was trying to establish that the undercover officer "induced him [Ware] to make the sale" (Tr. 71).

Following the *voir dire*, the government withdrew its proffer of appellant's preliminary hearing admissions and rested its case (Tr. 148). Appellant's counsel thereupon informed the Court that he had advised appellant not to take the stand on his own behalf and that appellant was "satisfied" with that advice (Tr. 149). The jury found appellant guilty of the first two counts of the indictment and acquitted him of the third (Tr. 158-59). On February 8, 1965, the government filed with the District Court information with respect to appellant's prior conviction for a Federal narcotics offense. At his sentencing hearing on March 2, 1965, appellant admitted this prior narcotics conviction (S.Tr. 2-3),[8] and Judge Pine sentenced him to

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[7] See note 5, *supra*.

[8] "S.Tr." refers to the sentencing transcript in Criminal Case No. 596-64.

ten years imprisonment on each count, sentences to run concurrently.

On the day of sentencing, appellant, through his attorney, filed an "Affidavit For Leave To Proceed On Appeal Without Prepayment of Costs" in which he alleged five points for appeal. None of these points in any way referred to any defects in appellant's preliminary hearing or the effect of his statements at the hearing on his trial. Leave to appeal *in forma pauperis* was granted by the trial court and this Court appointed Sigmund Timberg to represent appellant on appeal. The only issue raised by appellant on direct appeal pertained to alleged defects in selection of grand and petit jurors, which was the subject of appellant's motion to dismiss the jury panel filed in and denied by the court below. This Court affirmed appellant's conviction on November 3, 1965. *Ware* v. *United States, supra.*

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

United States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.

Title 2, Section 2202, District of Columbia Code, provides in pertinent part:

> The [Legal Aid] Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases and * * * in proceedings before * * * the United States Commissioner.
> * * * Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable.

Title 28, Section 2255, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to

be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 5, Federal Rules of Criminal Procedure provided in pertinent part at the time this case arose:

> (b) Statement by the Commissioner. The Commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The Commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

SUMMARY OF ARGUMENT

A motion to vacate sentence pursuant to Section 2255, of Title 28, United States Code is an adequate and effective remedy by which a Federal prisoner may seek to collaterally attack a final judgment of conviction on the ground that he was not advised of his right to appointed counsel at his preliminary hearing. Therefore, appellant's petition for the extraordinary writ of habeas corpus was properly denied on this basis alone. This is particularly true where appellant has filed two motions under Section 2255 raising this same ground for relief which motions were denied by the sentencing court, and appellant has ignored timely advice by the government in this case that he could and should appeal the denial of those motions.

However, treating appellant's petition as a motion pursuant to Section 2255, the files and records of his case conclusively show he is entitled to no relief on the ground asserted. *Blue* prescribed effective remedies whereby alleged defects in preliminary hearings must be raised prior to trial. Appellant had ample opportunity to resort to these remedies prior to trial, but limited his reliance on *Blue* to supporting his attempt at trial to exclude appellant's preliminary hearing admissions from evidence. Since these admissions were not admitted, and appellant raised no further issue concerning preliminary hearing defects at trial or on direct appeal, he is precluded from raising this issue for the first time on collateral review.

Since appellant's trial occurred after the *Blue* decision, the question of the retroactivity of the statutory right to counsel at preliminary hearing provided in *Blue* is not presented by this case. Should this Court hold for the first time that there is a constitutional right to counsel at preliminary hearing, considerations of the purpose of the new rule, reliance on the old rule by the courts and the Commissioner, and the effect on the administration of justice dictate against retroactive application of this newly announced constitutional right for the purpose of vacating convictions finalized prior to the announcement of this right.

Finally, the record clearly shows that appellant's preliminary hearing admissions were not admitted at trial in any form, and, therefore, any claim of prejudice as a result of appellant's preliminary hearing without appointed counsel are purely speculative. Hence, this collateral attack was properly denied without a hearing.

ARGUMENT

I. Appellant's Petition for Habeas Corpus Was Properly Denied Without a Hearing Since 28 U.S.C. § 2255 Makes Habeas Corpus Unavailable to Him.

Appellant's petition for a writ of habeas corpus was in the form of a collateral attack on the final judgment of his conviction in Criminal Case No. 596-64. He sought to set aside his conviction on the ground that he had been denied his right to counsel at preliminary hearing which, he alleged, adversely affected his subsequent trial. 28 U.S.C. § 2255 provides that the relief sought by appellant should be in the form of a motion to vacate sentence filed with the court which imposed that sentence. Section 2255 further provides that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, *shall not be entertained* if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also

> appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (Emphasis added.)

Thus, Judge Sirica, who was not the sentencing judge in appellant's case, correctly denied appellant's petition in reliance upon the government's Return and Answer which pointed out that appellant's remedy, if any, must come pursuant to Section 2255 and not by resort to the extraordinary writ of habeas corpus. *United States* v. *Hayman*, 342 U.S. 205, 223 (1952); *Smith* v. *Reid*, 89 U.S. App. D.C. 272, 191 F.2d 491 (1951).

In *Hayman*, the Supeme Court further noted that:

> If Section 2255 had not expressly required that the extraordinary remedy of habeas corpus be withheld pending resort to established procedures providing the same relief, the same result would have followed under our decisions. *Stack* v. *Boyle*, 342 U.S. 1, 6-7 (1951); *Johnson* v. *Hoy*, 227 U.S. 245 (1913); *Ex parte Royall*, 117 U.S. 241 (1886). 342 U.S. at 223 n.40.

Moreover, before habeas corpus would be available to appellant, it must be shown that Section 2255 was "inadequate or ineffective" in his case. *United States* v. *Hayman*, *supra* at 223. The fact that appellant's two motions under Section 2255, in which he alleged the same ground for relief as in this case, were both denied by Judge Pine, the sentencing judge, does not render the remedy under Section 2255 inadequate or ineffective. *Smith* v. *Reid*, *supra*; *Birchfield* v. *United States*, 296 F.2d 120, 122 (5th Cir. 1961).

In *Smith* v. *Reid*, *supra*, this Court was presented with virtually the identical situation as this case. After entering a plea of guilty and being sentenced for housebreaking and larceny, Smith filed a Section 2255 motion to vacate his sentence and withdraw his guilty plea on the ground that he has been deprived of his right to effective assistance of counsel. The motion was denied, as was leave to appeal *in forma pauperis*. "Later, after expiration of the appeal

period, and without having taken any further steps in the foregoing proceedings in the District Court or this court, appellant filed in the trial court a petition for writ of habeas corpus upon grounds similar to those stated in the motion to vacate sentence. The petition was denied." 89 U.S. App. D.C. at 273, 191 F.2d at 492. Smith appealed from the order denying the writ. This court held:

> The relief, if any, to which appellant may have been entitled was by motion under § 2255. He pursued that remedy, and was unsuccessful. But that procdeure was neither inadequate nor ineffective to test the legality of his detention. * * * His failure does not now entitle him to habeas corpus. *Ibid.*

Here, appellant not only failed to apply for leave of this court to appeal the denial of either Section 2255 motion but also ignored the advice expressed by the government in its Return and Answer that that remedy was "still available to him." Appellant should not be allowed to ignore the orderly processes provided for seeking the relief he desires and to choose whatever remedy he selects however inappropriate. See *Thornton* v. *United States*, — U.S. App. D.C. —, 368 F.2d 822, 825 n.5 (1966).

II. Treating Appellant's Petition as a Motion Pursuant to Section 2255, the Motion and Files and Records of the Case Conclusively Show That Appellant Is Not Entitled to Relief.

(Tr. 45, 71, 122, 132-38, 149; S.Tr. 5)

A. Appellant may not obtain collateral relief for alleged defects in his preliminary hearing.

On May 12, 1964, appellant was afforded a preliminary hearing by the United States Commissioner on a narcotics violation of which he was subsequently convicted (Criminal Case No. 596-64). Appellant was not represented by counsel at that hearing and the Commissioner had not informed him of his right to appointed counsel in the event he was indigent. Appellant testified at the hearing and made certain admissions. Following this hearing, but prior to

appellant's trial, this Court held on October 29, 1964, in *Blue* v. *United States, supra,* that the District of Columbia Legal Aid Act, 2 D.C. Code § 2202, required the Commissioner to inform an individual brought before him for preliminary hearing that "if he desired a lawyer and was unable to retain one, the Commissioner could assign one to represent him." *Dancy* v. *Untied States,* 124 U.S. App. D.C. 58, 60, 361 F.2d 75, 77 (1966). However, notwithstanding the fact that *Blue* involved a direct appeal from a conviction, that conviction was affirmed because there was no basis in the record for a finding that Blue was prejudiced by the defective warning. Procedures were adopted whereby future claims of such defects could be timely raised. The Court stated:

> It is, therefore, the third alternative of intervention by habeas corpus or mandamus *prior to trial* that we conceive to be the remedy best calculated to combine adequate relief to accused persons with the least burden to the Government and the courts. * * * With such opportunities available for relief before trial despite intervening indictment, there will, of course, be a corresponding obligation to make a timely assertion of the alleged defects *or, in default thereof, be thereafter foreclosed from reliance upon them as invalidating the conviction.* Every counsel who enters a criminal case will presumably review the preliminary proceedings and determine whether or not a defect of substance has occurred. With counsel appearing either at the preliminary hearing stage itself, or, at the latest, before arraignment upon the indictment, there is normally adequate time before trial to file the necessary petitions if they are called for. Naturally, an attorney will be entitled, upon consultation with his client, to decide that a minor flaw is not worth challenging, or that, as a tactical matter, it is to the defendant's advantage to forego the point. Thus, unless some reason is shown why counsel could not have discovered and challenged the defect before trial, it will generally be assumed that any objections to the preliminary proceedings were considered and waived, and *no post-conviction remedies will be available. Blue* v. *United*

States, supra at 321-22, 342 F.2d at 900-01. (Emphasis added.)[9]

In this case, appellant's trial counsel was appointed on July 1, 1964, and was present at appellant's arraignment on July 10. The Commissioner's Record of Proceedings of appellant's and his then co-defendant Powell's[10] preliminary hearing was filed in the District Court's record in Criminal Case No. 596-64 on May 14, 1964, two days after the hearing. The Commissioner's records clearly indicated that appellant had not been advised of his right to assigned counsel, that he was not represented by counsel at his hearing, and the fact and substance of his testimony before the Commissioner. Nevertheless, prior to appellant's trial, which began on January 28, 1965, approximately six and one half months after counsel's first appearance in the case and three months after this Court's decision in *Blue*, appellant's counsel made no attempt to remedy any possible defects in appellant's preliminary hearing, although

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[9] That *Blue* requires timely resort to pre-trial procedures to remedy alleged defects in preliminary hearings was recently emphasized in *Ross* v. *Sirica*, No. 20,535, D.C. Cir., January 23, 1967. The Court stated:

> * * * Indeed, in *Blue* we were *careful* to point out that persons intending to challenge an alleged defect in the preliminary hearing procedure should do so *promptly and before trial*. *Id.* at 6-7. (Emphasis added.)

That such timely action was particularly required of those defendants situated as was appellant at the time *Blue* was decided was cogently pointed out in the Statement of Circuit Judges McGowan and Leventhal As To Why They Vote To Deny Rehearing *En Banc* in *Ross* v. *Sirica*, *supra*, filed March 24, 1967, at 4-5:

> * * * The court announced in *Blue* for the first time that, in the District of Columbia by reason of the Legal Aid Agency Act, the accused should be offered counsel by the Commissioner—a right now reflected in the Federal Rules. The court knew that there must be defendants who, at the time *Blue* came down, had already been indicted but not tried. * * * The court was careful to say that any of these defendants who wanted the hearing which they had foregone without the advice or assistance of counsel should seek it before trial.

[10] Appellant and Powell were indicted together in this case. However, their trials were later severed and Powell's indictment was dismissed following his plea of guilty and sentence in another case, Criminal Case No. 597-64.

he did file a motion to dismiss the jury panel on December 1, 1964. Presumably, therefore, counsel was aware of these alleged defects, but, except for challenging the admissibility at trial of appellant's statements, "considered and waived" any objections to the preliminary proceedings. *Blue* v. *United States, supra* at 322, 342 F.2d at 901. Counsel was obviously aware of the *Blue* decision because he relied on it at trial as a basis for seeking to exclude appellant's preliminary admissions from evidence (Tr. 132-38). Counsel's purpose was clearly realized when the government withdrew its proffer of these admissions. Counsel clearly must have been satisfied that no further prejudice had resulted from any defects in the preliminary hearing or from these admissions, since he did not include any reference to these matters in the statement of errors for appeal he filed in appellant's application for leave to appeal *in forma pauperis*. No issue was raised with respect to the preliminary hearing or these admissions on direct appeal, although appellant was represented on appeal by a different appointed counsel.

Such a record manifestly establishes that any objection appellant may have had to defects at his preliminary hearing were waived and abandoned by his failure to raise them timely, i.e., either before or at trial and on direct appeal. *Blue* v. *United States, supra*. Recently, this court has held that "failure to raise these asserted deficiencies" in preliminary hearings "either before trial or at the trial itself, precludes their effective assertion for the first time on appeal." *Stith* v. *United States*, 124 U.S. App. D.C. 81, 82, 361 F.2d 535, 536 (1966). *A fortiori*, where, as here, no attempt was made to remedy these alleged defects prior to trial, the only objection at trial was to the admissibility of statements which were not admitted, and no issue concerning the preliminary hearing was raised on appeal, appellant is precluded from asserting these alleged defects for the first time on collateral attack.

What this Court said recently in *Thornton* v. *United States*, — U.S. App. D.C. —, 368 F.2d 822, 826 (1966), with respect to raising violations of constitutional rights

on collateral review is equally applicable to the present case:

> However, where effective procedures are available in the direct proceeding, there is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary.[11]

In *Earnshaw* v. *United States*, No. 20,474, D.C. Cir., decided June 7, 1967, appellant sought to attack collaterally his conviction on the ground that he had been denied his right to appointed counsel at his preliminary hearing. This Court affirmed the denial of his motion to vacate sentence by order, citing, *inter alia*, *Thornton* v. *United States*, *supra*.

B. The right to appointed counsel at a preliminary hearing is a statutory right only, and may not be raised on collateral review.

It cannot seriously be contested that the right to appointed counsel at a preliminary hearing established by *Blue* was based on statutory, not constitutional, grounds. "Blue expounds the statutory right to counsel, under the District of Columbia Legal Aid Act, of the arrested person brought before the commissioner." *Hairston* v. *United States*, 123 U.S. App. D.C. 286, 359 F.2d 270 (1966); and see *Nance* v. *United States*, 123 U.S. App. D.C. 289, 359 F.2d 273 (1966). Appellant concedes that this "Court has not yet held that there is a constitutional right to counsel at the preliminary hearing." (Brief for Appellant, p. 46.)

It is also well established that such statutory rights may not be raised for the first time in a collateral attack on a final judgment of conviction. *Nance* v. *United States*,

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11 There can be no question that the procedures prescribed in *Blue* for seeking timely reparation alleged defects in preliminary hearings are both adequate and effective. See *Ross* v. *Sirica*, No. 20,535, D.C. Cir., January 23, 1967; *Carter* v. *Schweinhaut*, No. 19,044, D.C. Cir., February 2, 1965.

supra; Thornton v. *United States, supra.* Indeed, this Court has recently denied three attempts to raise allegations of absence of appointed counsel at preliminary hearings for the first time on collateral review. *Nance* v. *United States, supra; Brooks* v. *United States,* No. 20,239, D.C. Cir., January 5, 1967 affirmed by order (citing *Nance, supra*), *Earnshaw* v. *United States, supra,* (citing, *inter alia, Nance, supra*).

C. Even if constitutional in scope, the right to counsel at preliminary hearing may not be raised by appellant for the first time on collateral review.

Even assuming *arguendo* that under *Blue* appellant had a constitutional right to counsel at his preliminary hearing, he may not be permitted to refrain from asserting a denial of that right until such time as his conviction becomes final while preserving this point for collateral review. As was argued in Point II A, *supra,* Blue makes it clear that defects in preliminary hearings must be asserted "at the earliest possible moment," 119 U.S. App. D.C. at 321 n.7, 342 F.2d at 900 n.7. Failure to resort to the effective procedures provided for remedying denials of constitutional or statutory rights at the pre-trial or trial level, particularly where, as here, appellant had an opportunity to seek relief at those early stages, precludes a criminal defendant from asserting those rights for the first time on collateral attack. *Thornton* v. *United States, supra.*[12]

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[12] The same considerations preclude appellant from claiming for the first time in this collateral proceeding that the Commissioner's failure to advise him of his right to appointed counsel deprived him of equal protection of the law. However, it is pointed out that appellant never informed the Commissioner that he was indigent nor requested the appointment of counsel. The advice given by the Commissioner was in strict compliance with Rule 5(b) of the Federal Rules of Criminal Procedure as prescribed by the Supreme Court. Any possible discrimination against indigents as a result of these procedures was implicitly deemed not to amount to a denial of equal protection by this Court in *Blue*, which rested its decision on statutory grounds and refused to reverse Blue's conviction since his objection was untimely, and he was not prejudiced by the defect in his preliminary hearing.

D. Should this Court establish for the first time a constitutional right to counsel at preliminary hearing, that ruling should not be retroactively applied to convictions finalized prior to the recognition of this right.

Since appellant's trial did not take place until after *Blue* was decided and appellant therefore had ample opportunity either before or at trial or on appeal, see *Dancy* v. *United States, supra,* to remedy any defects in his preliminary hearing, this case does not involve a question of retroactive application of the statutory right to counsel at preliminary hearing announced in *Blue.* However, should the Court decide for the first time that an indigent has a *constitutional* right to appointed counsel at a preliminary hearing, such a ruling should not be applied retroactively to convictions, such as appellant's, which have become final prior to the recognition of this right.

Recently, the Supreme Court dealt with the question of whether its newly announced constitutional right to counsel at pre-trial lineups, which the Court that same day had held to be a "critical stage" in the criminal process, *United States* v. *Wade,* 87 S.Ct. 1926 (June 12, 1967); *Gilbert* v. *California,* 87 S.Ct. 1951 (June 12, 1967), should be retroactively applied. *Stovall* v. *Denno,* 87 S.Ct. 1967 (June 12, 1967). The Supreme Court held that *Wade* and *Gilbert* would apply only prospectively; that is, they would apply to those cases which involve confrontations for identification purposes in the absence of counsel occurring after June 12, 1967. Thus, even those defendants who had been deprived of their constitutional right to counsel at this critical stage and who had not yet been brought to trial or whose appeals were still pending could not benefit from this newly announced constitutional ruling. *Stovall* v. *Denno, supra,* at 1972.

Similar considerations of (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards, which governed the Supreme Court's decision in *Stovall,* dictate that a newly promul-

gated constitutional right to counsel at preliminary hearing be given prospective effect only. See *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). It is pointed out that this Court on three recent occasions has rejected contentions that the absence of appointed counsel at a preliminary hearing was a constitutional violation which must be remedied retroactively in the form of a collateral attack on a final conviction. *Nance* v. *United States, supra; Brooks* v. *United States, supra; Earnshaw* v. *United States, supra.*

E. The record shows that appellant was not prejudiced by the absence of appointed counsel at his preliminary hearing.

Appellant contends, in a very broad and general way, that he was prejudiced at trial as a result of not having appointed counsel at his preliminary hearing "because the government had an unfair advantage in the preparation of its case." (Brief for Appellant, p. 40). This contention is refuted by the record which clearly shows that appellant's trial counsel, though fully aware of the *Blue* decision and the remedy provided therein for correcting defects and inequities resulting from preliminary hearings conducted without assigned counsel, limited his objections in reliance on *Blue* to the introduction into evidence of appellant's admissions in his testimony at that hearing. Since these statements were never admitted into evidence, the only possible prejudice which might have affected appellant's trial was eliminated.

In *Nance* v. *United States, supra* at 291, 359 F.2d at 275, this Court held that:

> * * * there is no constitutional right of counsel at preliminary examination which must be given retrospective application, in the form of collateral attack on a final judgment, at the instance of a defendant who made no representation of indigency, *and whose claim of prejudice from lack of counsel lies in his making of a voluntary statement not elicited by questions of Government officials.* (Emphasis added.)

Nance's statement was admitted into evidence at his trial. *A fortiori,* since appellant's statements were not used at his trial, he can claim no prejudice therefrom sufficient to justify vacating his conviction in this collateral proceeding.[13]

Any contention that appellant's testimony at his preliminary hearing deprived him of his defense of innocence and prevented him from taking the witness stand on his own behalf is completely refuted by the record.

Appellant's trial counsel made it clear at a bench conference that the defense was not raising any issue as to whether Ware had sold narcotics to Officer Hampton, but was trying to establish that the undercover officer "induced him [Ware] to make the sale" (Tr. 71). This attempt to establish an entrapment defense began even before the admissibility *vel non* of appellant's statements had been resolved.

After the Government rested its case, appellant's counsel informed the Court that he had advised appellant not to take the stand and that appellant was "satisfied" with that advice (Tr. 149). There is nothing in the record to indicate that counsel's advice was predicated on his assumption that appellant would be impeached by his admissions. No request was made of the trial judge to rule on the admissibility of those statements for impeachment purposes. *Cf. United States* v. *Poe,* 122 U.S. App. D.C. 163, 352 F.2d 639 (1965). It is more logical to assume that counsel's

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[13] Appellant tries to distinguish *Nance* on the ground that appellant was indigent and Nance was not. However, like Nance, appellant "made no representation of indigency" to the U.S. Commissioner. Furthermore, in Criminal Case No. 602-64, *United States* v. *Ware and Cooper,* (Tr. 45), the record therein reflects that on November 29, 1965, Judge Bryant entered an order terminating the appointment of appellant's counsel, Mr. Rowan, based on a finding that appellant was "financially able to obtain counsel or to make partial payment for the representation." Although not included in the record on appeal in this case, this Court may take judicial notice of the records of the District Court in Criminal Case No. 602-64.

Finally, in *Earnshaw* v. *United States, supra,* appellant therein requested that the Commissioner appoint counsel to represent him. Nevertheless, this Court rejected his contentions which were similar to appellant Ware's, citing *Nance.*

advice was based on his sound judgment that if appellant took the stand he would be impeached by one or more of his four previous felony convictions, including a prior narcotics conviction (S.Tr. 5). See *Carter* v. *United States*, No. 20,091, D.C. Cir., March 2, 1967.

It is difficult to imagine why the existence of appellant's preliminary hearing admissions would, by themselves have prevented appellant from testifying at trial. Nothing in those admissions, whether from his direct testimony or the cross-examination by the government, was inconsistent with his defense at trial of entrapment. It is pointed out, however, that appellant insisted on testifying at the preliminary hearing despite repeated warnings by the Commissioner of the possible future consequences and clear advice that "it might not be wise for you [Ware] to testify without an attorney" (Tr. 122). Appellant could not expect to be permitted to contradict these statements and deny all involvement with this transaction, without being subjected to impeachment by his voluntary statement given under oath before a judicial officer. See *Woody* v. *United States*, No. 20,298, D.C. Cir., May 11, 1967.

Hence, the most that can be said of these contentions is that the "possibilities of prejudice are speculative." *Hairston* v. *United States, supra.* Appellant's claim of prejudice can thus be dismissed on the present record without requiring any further hearing. See *Brooks* v. *United States, supra.*[14]

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[14] Appellant's reliance on *Chapman* v. *California*, 386 U.S. 18 (1967) as requiring the government in a collateral proceeding to prove beyond a reasonable doubt that a constitutional error complained of was harmless is completely misplaced. *Chapman* involved a constitutional error committed at trial, namely, comment by the prosecutor on the defendant's failure to testify, which was raised as an issue on direct appeal. The law is clear that in a collateral attack on a final judgment, appellant has the "burden of establishing his right to relief". *Nance* v. *United States, supra.* And see *Miller* v. *United States*, 261 F.2d 546 (4th Cir. 1958).

CONCLUSION

Wherefore, it is respectfully submitted that the denial of the issuance of the writ of habeas corpus by the District Court should be affirmed.

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BRIEF FOR APPELLEES

446

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20690

LIBERTY LOBBY, INC. ET AL., *Appellants*,

v.

DREW PEARSON, ET AL., *Appellees*.

Appeal from an Order of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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STATEMENT OF QUESTIONS PRESENTED

Two newspaper columnists factually reported matters of legitimate public interest and discussed newsworthy events related to the anti-Semitic and anti-Negro views and activities of two top Liberty Lobbyists contained in an exchange of letters between them—one the organizer, founder, brains and paid treasurer of the Lobby and the other a nationally known Southern segregationist author and writer, a national public figure, now a judge of the Mississippi Supreme Court, and both long-time members of the Lobby's Board of Policy.

Liberty Lobby, which seeks to guide public policy, to mould public opinion on public issues and matters of national public interest, public affairs, public questions and to influence inter alia civil rights legislation, solicits and receives funds from the public for such purposes, and is in a position significantly to influence the resolution of public issues.

The basic existence of this registered corporate lobbyist depends upon funds solicited and received from the public.

In the opinion of the appellees the questions presented by this appeal are as follows:

1. Did the trial court on the record below abuse its discretion in refusing to enjoin the publication of news?

2. Is it an actionable invasion of appellants' privacy to report factual information in so-called "private" letters, where ownership is in dispute, which do not concern the private life, habits, acts and relations of appellant Carto, but on the contrary concern participation in public activities and matters of legitimate public interest?

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CITATIONS

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* Cases marked with asterisk are chiefly relied upon.

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APPENDIX

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an action for invasion of privacy.

October 26, 1966. The verified complaint (Joint Appendix, pp. 1 to 11 incl.), hereafter JA) filed and sworn to by the executive secretary of appellant Liberty Lobby, Inc. *as being true of his own personal knowledge*, sets forth that appellees Drew Pearson and Jack Anderson are newspapermen who publish articles in newspapers in the Wash-

ington Merry Go Round column: that Liberty Lobby employed appellee Jeremy Horne in April, 1966, as corresponding secretary, his duties being to answer letters, from publishers and from others, on editorial policy. It also alleges that during the course of his employment from April to September, 1966, Horne without authorization copied certain letters and documents in Liberty Lobby's files, "*which are the property of . . . Liberty Lobby*" (JA 3), turned them over to Pearson and Anderson who, in their columns of October 18 and 21, 1966 (JA 5 to 11 incl.) reporting on anti-Jewish and anti-Negro racial extremists, right wing leaders, right wing sympathizers and Liberty Lobby's fund raising methods, published the contents of letters between Carto, described as the founder of Liberty Lobby and a former member of the John Birch Society, and Judge Tom P. Brady, a nationally known segregationist, relating to a plan to send negroes back to Africa, and the rising and openly expressed anti-Jewish feeling in the South. It is also alleged that Pearson and Anderson are about to publish further revealing (unspecified) letters which would be a wrongful intrusion into the private affairs of Liberty Lobby causing embarrassment and humiliation to it and its numerous subscribers.

The only letters specified in the complaint are the "Carto letters" which the executive secretary swears of his own personal knowledge *belong to Liberty Lobby.*

October 26, 1966. After hearing oral argument and considering the matter for a whole day, Judge Leonard P. Walsh denied Liberty Lobby's application for a restraining order (JA 14) saying the courts are reluctant to grant summary relief in the absence of a full and complete hearing on the merits and a clear showing of irreparable damage and no adequate remedy at law, the question of where the material came from being a collateral issue.

In his findings set out in full in JA 11 to 14 incl., Judge Walsh refers to *Estate of Hemingway* v. *Random House,*

Inc. (1966) 286 N.Y.S. 2d 531, which indicates that the normal reluctance of courts to impose summary restraint is particularly acute in dealing with publication of a book and before the Court will intrude into such area it will require a showing by movant of a *right both legal and factual in most unequivocal terms.*

November 7, 1966. *An unverified amended complaint* (JA 17, 18, 19) filed pursuant to ex parte order, added appellant Willis A. Carto as a co-plaintiff, set forth that Carto had lodged with Liberty Lobby certain private papers and letters, which are the property of plaintiffs and asked for injunctive relief and damages for wrongful intrusion into the private affairs of both Carto and Liberty Lobby, wrongful violation of their property rights which caused outrage, embarrassment and humiliation to them and Liberty Lobby's subscribers by publication of the same letters in the October 18 and 21 columns. It also alleged that further publication of this material would cause irreparable injury to the plaintiffs. Again the *material was not specified nor identified.*

November 18, 1966. In his affidavit (JA 20) (filed but not served on appellees) W. B. Hicks, Jr., Executive Secretary of Liberty Lobby changed his position and stated *on information and belief* that certain documents, letters and correspondence belonging to W. A. Carto or Liberty Lobby were illegally copied by Horne and given or shown to Pearson and Anderson. The material was still *not specified nor identified.*

In the original verified complaint, W. B. Hicks, Jr. swore *of his own personal knowledge* the material Horne turned over to Pearson and Anderson belonged to Liberty Lobby. Thus there is a contradiction on the face of the record as to the ownership of the letters and silence from Carto.

Appellees deposed W. B. Hicks, Jr., Executive Secretary of Liberty Lobby on November 22, 23, 1966, and

appellant deposed appellee Jeremy Horne on December 2, 1966.

Appellants' motion for a preliminary injunction was heard on December 20, 1966. *Appellant Carto did not verify the amended complaint. He did not file an affidavit. He gave no evidence.* There is no evidence in this record from Mr. Carto to prove he is the owner of the letters and documents. There is nothing to prove the essential fact of ownership upon which he bases his cause of action. (A Motion to Dismiss is now pending in the court below). On the contrary it is stated in the moving papers (JA 3, 18) that *the letters are the property of Liberty Lobby* although it does not set out in what way Liberty Lobby acquired ownership and in effect is a conclusion of law. None of Liberty Lobby's files have been published by appellees (JA 105, 106). Liberty Lobby's damages, "in terms of dollars" are two days loss of Hicks' time in testifying on deposition, maybe more (JA 106). Carto offered no proof of damages or ownership of letters. The case is now before this Court on appeal from the order denying a preliminary injunction. (JA 33, 34).

On February 3, 1967, this Court denied appellants' motion for summary reversal of that order.

The depositions and affidavits, including that of appellee Pearson (JA 34, 35, 36, 37) and the record below establish the following facts.

Liberty Lobby Activities

Liberty Lobby is a pressure group (JA 54-58 incl.), see Exhibit 5, "Liberty Lobby Presents L.B.J.*" (J.A. 54);

* This is the Liberty Lobby publication referred to in the column of October 18, 1966, of which ten to fourteen million copies were sold or distributed. For the convenience of the court, brief excerpts from the W. B. Hicks, Jr. deposition exhibits 2, 3, 10, 14 and 22 are annexed hereto as an appendix. The originals of these exhibits, which are part of the record on appeal, were identified by Mr. Hicks, Jr. as being publications of Liberty Lobby and the Washington Observer.

takes positions for or against legislation; seeks to guide public policy; seeks and receives funds from the public for that purpose; offers a service to the public for that purpose; invites readers and subscribers to write to their senators and congressmen on pending legislation; presents its views at legislative hearings; appeals for help to kill civil rights bills; suggests to subscribers positions to take on national issues; organizes public opinion; is in the public arena; appeals to the public for support and engages in lobbying (JA 72, 73, 74); one of its chief purposes being to expand its influence.

Willias A. Carto

Mr. Carto is the founder, organizer, and from the beginning has been and still is Treasurer of Liberty Lobby (JA 65, 66) paid by Liberty Lobby (JA 87); he employed Hicks as Executive Secretary (JA 46) and authorized Hicks to sign checks for the Washington Observer (JA 39). As Treasurer of Liberty Lobby, he is the superior officer of Hicks (JA 45) and in absolute control of the group (JA 113); no one keeps a record of Mr. Carto's presence or absence from the Washington office (JA 51, 76, 77). As Treasurer he is in absolute control of the funds of Liberty Lobby (JA 46, 86). He is connected with the American Mercury (JA 81) which is now combined with the Washington Observer and is also connected with the Noontide Press (JA 85).

W. B. Hicks, Jr.

W. B. Hicks, Jr., the Executive Secretary of Liberty Lobby, was employed by Carto. He helped launch the Washington Observer newsletter, edited its contents, and still signs an occasional check for it, being authorized to do so by Carto (JA 39). He also did promotional work for the Washington Observer and used the pseudonym of Lee Roberts to avoid identifying a real individual with the promotional effort (JA 40). Hicks does not know how many or

who are directors of Liberty Lobby (JA 46) and knows of only two corporate officers (JA 46). The Board of Policy did not meet in 1965 (JA 85). The policies of Liberty Lobby were fixed by an earlier Board (JA 85). Willis A. Carto and Judge Brady were members of that board in 1964; the exhibits now of record show they have been board members from the beginning. Hicks talks to Carto by phone several times a week, at least every other day, concerning the operations of Liberty Lobby (JA 99) which sold the Washington Observer to the American Mercury in May or June, 1966 (JA 39).

Jeremy Horne

Horne testified he was employed by Carto in April, 1966 (JA 130) first as assistant researcher, then promoted by Carto to corresponding secretary (JA 132) and later, after Carto's approval, made circulation manager (JA 132). He had full run of the place (JA 132, 133), *was authorized to pick up mail* (JA 90), *to clean out the closet* and make more storage space available for propaganda *which Carto, Hicks and Phillips, the office manager, knew he was doing* (JA 119, 125). While cleaning out the closet, Horne came across an unsealed box (JA 119) marked "Personal, W. A. Carto, Civil Rights" (JA 119), found some letters, saw some of the contents, which he thought were horrible (JA 120), made copies and took them to the F.B.I.

Horne did not know the letters were the private property of Carto—there was no proof of that (JA 125) nor that income tax returns which he copied for the purpose of turning them over to the F.B.I. were the property of Liberty Lobby (JA 125). There was no proof one way or the other (JA 125). Horne thought a financial fraud (JA 124) was being committed on the public; the letters were subversive, warranted an investigation, and the F.B.I. has thought the same thing (JA 127). Horne had brought in mail sacks which totaled $100,000 over a ten day span (JA 136).

Horne did not remove any original material. (JA 122) *He does not have a list of the material*—the F.B.I. has it (JA 129). Hicks also testified Horne did not list documents (JA 98). Horne first wrote to J. Edgar Hoover on August 24, 1966, and two weeks later was called down to F.B.I. Headquarters and interrogated for three hours by Agent C. E. Glass (JA 116, 117, 118).

Horne met Mr. Pearson for the first time on October 1, 1966, (JA 138) and showed Mr. Pearson certain materials. *He did not keep a list of them* (JA 129, 141).

On October 24, 1966, he visited the apartment of Pat Hill, an employee of Liberty Lobby (JA 117). He was not aware his conversation was being bugged by Liberty Lobby. Had he known it, he wouldn't have gone.

A comparison of the foregoing testimony with the statements made by appellants at page 2 of their brief clearly demonstrates that appellants' statements are not supported by the record. There is no proof that Carto is the owner or has a property right in the letters—though this claim of property in the correspondence is the basis of his amended complaint. Liberty Lobby claims the so-called Carto letters are the property of Liberty Lobby. Horne did not act surreptitiously. Carto knew he was cleaning out the storage closet where the so-called private letters were stored.

SUMMARY OF ARGUMENT

I.

A. The court below did not abuse its discretion in refusing to enjoin publishing news concerning newsworthy matters and factual reporting of events of legitimate public interest, since

1. Appellants failed to show irreparable injury, (the only damage was two days loss of time, maybe more for Liberty Lobby, none for Carto) and lack of an adequate remedy at law.

2. Equity does not enjoin a libel or slander, *Kukatush Mining Co.* v. *Securities & Exchange Commission*, 114 U.S. App. D.C. 27, 309 F. 2d 647, 651, nor an alleged invasion of privacy consisting, as it does here, in publishing letters of disputed ownership which do not concern the private life, habits, acts and relations of the writer, but on the contrary deal with newsworthy facts of legitimate public interest—anti-Semitism and repatriation of Negroes, intended to be and widely published and debated by both the writer and recipient.

3. It is in our tradition to allow a free flow of information, the widest room for discussion and the narrowest range for restriction; "the central commitment of the First Amendment . . . is that 'debate on public issues should be uninhibited, robust and wide open.'" *New York Times* v. *Sullivan*, (1964) 376 U.S. 254.

4. To enjoin publishing of news would be prior restraint, an abridgement of freedom of the press, *Near* v. *Minnesota*, 283 U.S. 697, which the Constitution has put in a preferred position even as against the constitutional right of owners of property. *Marsh* v. *Alabama*, 326 U.S. 501.

II.

A. There is no actionable invasion of privacy here, nor can there be, absent a showing of knowing or reckless falsehood. *Time, Inc.* v. *Hill*, 87 S. Ct. 534, 542.

The factual reporting of newsworthy persons and events is in the public interest and *is* protected. *Time, Inc.* v. *Hill*, *supra*, at p. 539.

The right of privacy is not an absolute; it must give way to the right of the press which is "crucial to the vitality of democracy" to publish matters of public interest. Appellants have no immunity from responsible newspaper discussion about their activities and racial views. *Afro-American Pub. Co.* v. *Jaffe*, 124 U.S.App.D.C. , 366 F. 2d 649.

The principle of privacy protects the private personality and emotional security of an individual (not of a corporation); it protects the private life, habits, acts and relations of an individual, not issues in the public domain; it protects those with whose affairs the community has no legitimate concern. *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817, 831.

The principle which protects personal writings is not that of private property. This fictional and outmoded basis has been discarded by the courts. *Hazlitt* v. *Fawcett Publications*, 116 F. Supp. 538, 543.

The right to privacy ceases upon the publication of the facts by Carto or with his consent. *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817, 834. The facts were widely published in the Washington Observer of November 15, 1966, formerly owned by Liberty Lobby, Carto presently being treasurer of Liberty Lobby and of the Washington Observer.

The ruling of the lower court is correct and should be affirmed.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ENJOIN PUBLICATION OF NEWS

A. Abuse of Discretion.

1. The test on appeal is whether the trial court abused its discretion in denying a preliminary injunction. *Meccano, Ltd.* v. *John Wanamaker*, 253 U.S. 136. A motion for a preliminary injunction rests in sound discretion of the trial court and upon appeal an order denying such an injunction, except for strong reasons, will not be disturbed. *Meccano, Ltd.* v. *John Wanamaker, supra*, at p. 141.

Denial of a preliminary injunction will not be set aside on appeal unless there was abuse of discretion or clear error. *Cox* v. *Democratic Central Committee*, 91 U.S. App. D.C. 416, 200 F. 2d 356 (1952); *Young* v. *Motion Picture*

Ass'n of America, 112 U.S. App. D.C. 35, 37, 299 F. 2d 119, 121, cert. denied 370 U.S. 922, 82 S. Ct. 1565, 8 L. Ed. 2d 504 (1962).

We submit the court below, on the record before it, did not abuse its discretion. It exercised sound judicial discretion.

In granting or denying a preliminary injunction where only private interests are involved the trial court is called upon to exercise its discretion upon the basis of a series of estimates of the relative importance of the rights asserted and the acts sought to be enjoined; as in the case of a husband seeking to enjoin his former wife from suing his present wife, *Perry* v. *Perry*, 88 U.S. App. D.C. 337, 190 F. 2d 601. However when the *public interest* is involved the trial court should also consider the effect of the grant or denial of a temporary injunction upon that interest and courts of equity frequently go much further to withhold relief in furtherance of the public interest than they customarily do when only private interests are involved. *Yakus* v. *United States* (1944) 321 U.S. 414, 440, 441.

Where there is a conflict between a public interest and a private interest, the public interest should prevail, and the private interest should yield.

Here appellants claim actionable invasion of privacy and property rights. Appellees say prior restraint on publishing news would be censorship, would be in conflict with First Amendment constitutional rights, with the compelling public interest in the free flow of factual information about anti-Semitism and racism, "the right of the public to know", the duty and the "freedom of the press to inform".

This is a right of privacy case involving the important constitutional questions of freedom of speech and press.

Libel and privacy are closely associated as *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), a libel case, and *Time, Inc.* v. *Hill*, 385 U.S. , 87 S. Ct. 534 (1967), a right of privacy case, clearly show. See for example Note 9, p. 540, where the court said: ". . . Many 'right

of privacy' cases could in fact have been brought as 'libel per quod' actions, and several have been brought on both grounds . . . (citing cases). Although not usually thought of in terms of 'right of privacy', all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right of privacy' cases, the primary damage is the mental distress from having been exposed to public view, . . ."

The general limitations of the right to privacy and remedies granted for the enforcement of the right were first suggested by those developed in the law of libel, Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890), and later "recognized in well reasoned District Court opinions." *Afro-American Pub. Co.* v. *Jaffe*, U.S. App. D.C. , 366 F. 2d 649, 653. In 1890 the authors recognized there would be a conflict with the constitutional protections for speech and press (id. 214).

"A common law action for invasion of privacy is maintainable in the District of Columbia . . . It represents a vindication of the right of private personality and emotional security . . . 'The right to be let alone' ". *Afro-American, supra,* p. 653.

At the outset we must keep in mind that two matters of public interest and general interest, and two newsworthy facts stand out here: anti-Semitism, as reported and discussed in the October 18 column (JA 5-7) and racism, as reported and discussed in the October 21 column (JA 8-11) or, in appellant Carto's words, "the Jews and the niggers" (JA 113).

When harmonizing individual rights and community or public interests, this court recently said, "In appraising challenged violations of privacy 'a distinction can be made in favor of news items and against advertising use' ". *Afro-American, supra,* p. 654.

For the convenience of the court, copies of appellees' columns of October 18, 21 and 26 appear on the following pages.

2. No injunction may issue to prevent or stop the publication of defamatory matter.

"It is a well settled rule of equity that equity does not enjoin a libel or slander . . ." *Hoxsey Cancer Clinic* v. *Folsom* (1957) 155 F. Supp. 376, 377, the only remedy being an action for damages. Nor are the court's injunctive processes available where the wrong, if any, sounds in libel; see e.g. *Dayton* v. *McGranery,* 92 U.S. App. D.C. 24, 201 F. 2d 711. In general equity does not enjoin a libel or slander. *Kukatush Mining Corp.* v. *Securities and Exchange Commission* (1961) 198 F. Supp. 508, affirmed 114 U.S. App. D.C. 27, 309 F. 2d 647.

See to the same effect *Kuhn* v. *Warner Bros. Pictures,* 29 F. Supp. 800 (1939).

So in privacy cases to enjoin publishing of news "hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society". Black, J., concurring in *Time, Inc.* v. *Hill, supra,* 87 S. Ct. at 549.

Enjoining publication of newsworthy items would be an abridgement of freedom of speech and press. Such restraint in advance of publication is unconstitutional. *Near* v. *Minnesota ex. rel. Olsen* (1931), 283 U.S. 697, where the historical background of the First Amendment was fully discussed.

Since 1925 the Supreme Court in "a series of decisions has held immune from . . . invasion every first amendment protection for the cherished rights of mind and spirit—the freedom of speech, press, religion, assembly . . ." *Gitlow* v. *New York,* 268 U.S. 652 (1925) (speech and press); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936) (press); *Lovell* v. *City of Griffin,* 303 U.S. 444, 450 (1937)

Right-Wing Leaders to Meet Here

By Drew Pearson and Jack Anderson

An important "Conference of Conservatives" is to be held in Washington this winter to celebrate the promised victories of Ronald Reagan in California, Lurleen Wallace in Alabama, Brig Gen. Harrison Thyng in New Hampshire, Claude Kirk in Florida, and other right-wing candidates whom the Liberty Lobby and extremists groups are backing.

To arrange for the convention, Curtis B. Dall, former son-in-law of Franklin D. Roosevelt, dropped into Liberty Lobby headquarters the other day to sign a letter to members asking them to vote on who should call on President Johnson to present right-wing views.

Though members of right-wing groups don't like to have their operations reported in the press, this column can reveal that an argument took place between Dall and Willis A. Carto, founder of the Liberty Lobby, as to whether Kenneth Goff should be on the delegation to see the President.

Goff is a former Communist who later teamed up with rabble-rousing, anti-Semitic Gerald L. K. Smith and is now a member of the secret board that controls the Liberty Lobby. Dall, who is chairman of the Liberty Lobby's board of policy, argued that Goff was too controversial to be on the five-man delegation to call at the White House.

Dall, since divorced by Anna Roosevelt, only daughter of the late President, has been engaged in business in Philadelphia and has been a front for the Liberty Lobby. He has also been active in the Constitution Party, which urges American withdrawal from the United Nations, the repeal of Federal income and state inheritance taxes.

Lost Libel Suit

In August, 1962, Dall testified before the Senate Finance Committee that the "real center and heart of this international cabal (to promote the Trade Expansion Act) shows its hand; namely, the political Zionist planners for absolute rule via one world government"

When this column reported Dall's testimony and described it as anti-Semitic, he sued for $2 million but lost. He appealed right up to the Supreme Court, but lost in all courts.

Though the leaders of the "Conference of Conservatives" seemed confident that President Johnson would see them, it may not be as easy as they predict. This column has seen some of the files of the Liberty Lobby and can reveal the far-flung network of affiliated conservative groups backing Reagan in California, Mrs. Wallace in Alabama, Lester Maddox in Georgia, Brig. Gen. Thyng in New Hampshire, Robert Cline, the extremist now running for Congress from Los Angeles, and other right-wing candidates around the U.S.A.

We can also reveal that in the closet of the Liberty Lobby office of director Willis Carto there are two high-powered Japanese rifles secreted in a packing case.

On Nov. 22, 1963, lawyers for this column were taking the pre-trial deposition of John W. Wood, then attorney for the Liberty Lobby, when news of President Kennedy's assassination was received. It was suggested that in view of the assassination, the deposition should be suspended.

"You must feel as bad as Madame Nhu when President Kennedy ordered her husband gunned down," remarked Carto.

Vicious Attack on LBJ

Carto, when asked by a subordinate on his staff what he is doing with the rifles, explained that they were to be shipped back to California. The rifles, however, are still there.

Whether President Johnson chooses to see the delegation of conservatives or not, we believe that the public is entitled to know something of their backstage operation.

The Liberty Lobby office is located at 132 3rd st. se., in Washington and has a working relationship with the United Republicans of America under Bruce Evans, whose goal is to have the conservatives take over the Republican party. The Liberty Lobby and the United Republicans of America frequently interchange office equipment.

Chief funds for the Liberty Lobby are raised from individual subscribers and from periodic mail appeals to a list of right-wing sympathizers. One week's mailing in August brought in approximately $100,000, which caused considerable glee on the part of Carto. He immediately went out and bought $300 worth of new office furniture.

At times the lobby has been hard up for funds, and in 1964 had to borrow money from Verne P. Cobb. Its "Liberty Letter" for $1 a year circulates to a subscription list of approximately 180,000.

Among its more generous contributors have been Conrad Chapman of Boston, J. H. Pew of the Sun Oil Co. in Philadelphia, Evelyn Beck of Alamo, Calif., and E. H. Mettler of Shafter, Calif.

Most important and vicious contribution which the Liberty Lobby has made to the political picture—at least openly—was the six-page smear called, "LBJ: A Political Biography," of which about 1 million copies were circulated throughout the United States during the 1964 presidential election.

Eastland Linked to Liberty Lobby

By Drew Pearson and Jack Anderson

Origin of the Liberty Lobby, the extremist organization which has been boosting right-wing candidates ranging from Ronald Reagan in California to Lester Maddox in Georgia, dates back to a letter written Jan. 26, 1957, by Willis A. Carto to Judge Tom P. Brady of Brookhaven, Miss.

Judge Brady, then on the 14th District Circuit Court, is now associate justice of the Mississippi Supreme Court. In 1948 he was national chairman of the States' Rights Speakers Bureau, and he has been a member of the Democratic National Committee since 1960. Carto, founder of the Liberty Lobby, was formerly a member of the John Birch Society, and has been active in right-wing groups for some time.

"Now, Judge," he wrote to Brady, "I do not think that I have ever mentioned to you that over a year ago I have been working on something tentatively called the Liberty Lobby. Briefly this involves the establishment of an office in Washington to lobby for patriotism . . .

"You can readily see the tremendous importance to the repatriation scheme if this Lobby ever gets set up," continued Carto, referring to a plan to send Negroes to Africa.

"On the other hand, you can see that there must never be any obvious connection between the two, for, if there is, either would kill the other off or at least harm it gravely. Therefore I have had to make a decision, and it is that the logical thing to do is to become publicly identified with the Lobby only and to endeavor to get this set up first while trying to help the idea of repatriation as best I can without becoming too closely identified with it for the time being . . .

"Big and Mad"

"All this sounds very big and a little mad; but only mad plans can hope to save the white race, now heading for oblivion. A small group with a plan, if they are determined enough, have often made monkeys out of history.

"Quite possibly I can prevail on Col. Ernest Sevier Cox of Richmond to travel up to Washington while I am there and persuade him to see Sens. Eastland, Talmadge, Thurmond and Byrd and to lay before them the repatriation scheme, emphasizing the economic angle which is the heart of the whole thing . . .

"Please let me know your reaction and thought to the above, Judge," concluded Carto. "No doubt you will have some advice. At any rate I hope that we have a chance later on this year for a long talk."

Judge Brady's reaction came in a letter dated Feb 17 which said:

"You are fighting the greatest danger and racial threat which faces our Government today. I commend you for your promotion of American race theories.

"I regret that I was unable to attend the Jan. 27 meeting in Chicago. If our hope is realized in uniting the eight or ten Southern states by means of organization to combat the Black Monday (Supreme Court) decisions . . . I will do all within my power to see that you are given the opportunity to appear before this committee for presenting your program."

Sen. Eastland Helps

Judge Brady had a subsequent meeting with Carto in Biloxi and on April 27, 1957, wrote Carto again:

"Dear Carto:

"Shortly after your conference with Sen. Eastland, he called me and discussed at length the Lobby. I had already talked with him twice, urging him to consider very carefully the plan and program which you had outlined. He advised me that he thought there was considerable merit in the plan, but that he wanted to see me personally and see what alterations and additions should be added.

"I do not know how thoroughly he discussed with you the over-all program, but I assume that he briefed you on the major objectives . . . He expects to discuss the plan with outstanding Americans, and after he has done so, he and I will then have our discussion. The selection of the personnel and officers of the program is of utmost importance. I will certainly recommend that you be given careful consideration. In my opinion something very worthwhile and significant is going to be the outcome of your brainchild, and I commend you highly on the work you have already done."

Judge Brady had been in correspondence with Carto for over a year, and on May 6, 1956, Carto wrote Brady as follows:

"I have been interested to note this increasing sign of anti-Jewish feeling in the South, as being expressed more and more openly by various states' rights publications. The feeling seems to be that the Jewish groups are to blame for the troubles of the South. Both the last issue of the Virginian and the Southern Digest have brought out this opinion.

"Quite possibly the Jewish leaders have let themselves in for more than they bargain by their support of and harnessing of the Negro vote and the Negro moral issue. Time will have an interesting verdict (and I don't especially mean Time magazine). . . .

Sen. Talmadge of Georgia did not cooperate with Carto, but various others did. This column shortly will publish further revealing letters regarding one of the more potent right-wing organizations in the United States.

Liberty Lobby Links Right-Wing Drive

By Drew Pearson and Jack Anderson

A few blocks away from the Capitol operates an energetic office called the Liberty Lobby, which has served as a link between right-wing groups all over the Nation.

During the 1964 election campaign it distributed a million copies of a smear sheet against President Johnson, and today it is trying to elect various right-wing candidates, ranging from Lester Maddox in Georgia to Brig. Gen. Harrison Thyng in New Hampshire.

The files of the Liberty Lobby are most revealing. They show a conspiracy against both Jews and Negroes.

On one occasion, Curtis Dall, front man for the Liberty Lobby and former son-in-law of the late President Roosevelt, sued this column for $2 million because we described his testimony before a Senate Committee as "anti-Semitic." Dall lost the law suit in all courts, including an appeal to the Supreme Court.

Since the law suit we have found in the files of the Liberty Lobby this mimeographed statement by Willis Carto, organizer of the Lobby:

"The strangest of all strange things and the most unfair of all the unfair things brought on by Jewish control of American politics concerns the alleged recipient of buckets and buckets of hypocritical Jewish concern and sympathy—the American Negro!

"Jewish control over so-called 'Negro' organizations like the NAACP and the Urban League is so complete and has been identified so closely yet fraudulently in the public mind with the legitimate aims and aspirations of the American Negro that only few white Americans realize the truth about the fantastic trickery which brought this about.

"Only a few Negroes are genuinely in accord with the trouble-making policies of these two race-mixing organizations. It is a sad, yet significant fact that both of these fraudulent outfits prosper by using the brains of Jews, the money of Jews and duped white Christians and the 'front' of raceless mulatto figureheads. But hardly a Negro in the lot!"

Carto has carried on an amazing correspondence with such people as Robert B. Patterson, secretary of the White Citizens', Councils of Mississippi, Judge Tom Brady of the Supreme Court of Mississippi, Archbishop C. C. Addison of the African Universal Church in New York, a leader in the Black Muslim movement, and Norris Holt, a right-wing leader of Sausalito, Calif.

Back to Africa

In one letter to Holt, Carto stated:

"Am glad you like the mimeo sheets. Apparently the ones I sent it to are so overwhelmed by it that they can't even reach for a pen. Haven't heard anything about it. Getting concerned. I expected to hear from the niggers Tuesday.

"No, please don't do anything to publicize the JCR yet," Carto added, referring to the Joint Council for Repatriation of Negroes Back to Africa.

"I want to keep it as quiet as possible until we get a good, strong group behind us. To come out prematurely might mean immediate smears and destruction by the J's. If there are some strong men behind us, they won't be able to do that . . .

"There are 600 million Chinese and about 200 million Russians. All united in a determination to destroy the West. And we have been so misled that we live in a dream world—far away from reality. Hitler's defeat was the defeat of Europe. And America.

"How could we have been so blind? The blame, it seems must be laid at the door of the international Jews. It was their propaganda, lies and demands which blinded the West as to what Germany was doing."

In another letter written to Norris Holt, Carto says:

"Received another encouraging letter from a prominent American today. This one's from Judge Tom Brady of Mississippi. He's the author of 'Black Monday' and the originator of the idea from which the Citizens' Councils have grown."

Letter to Patterson

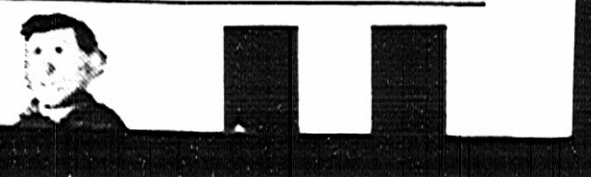
Writing to Robert B. Patterson, secretary of the White Citizens' Council of Mississippi, Carto described his program to move Negroes back to Africa as follows:

"Thank you for your letter of Feb. 1. It is a great personal pleasure to know of your interest in what we are trying to do, as I have read various of your articles in the 'Political Reporter' and the 'White Sentinel.' I feel that we both see eye-to-eye on many subjects.

"Living in the North, as I do, with its heterogeneous population of minorities, brainwashed whites and self-seeking, shortsighted prostitute politicians, it is not too hard to conclude that the Negro problem is the very keystone to the whole dirty scheme to destroy America.

"The Negro is needed as the most effective tool he has, by the enemy.

"Therefore, in striking right at the heart of the race problem, we are also striking at the heart of the whole subversive scheme against America."



(speech and press); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) (speech and press). *Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. at p. 3 (1965).

The protection which the law of privacy affords must be limited by the constitutional protections for public discussion and free flow of information. For example, under the New York "Right to Privacy" statute the "courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." *Time, Inc.* v. *Hill, supra*, at p. 539. " 'The factual reporting of newsworthy persons and events is in the public interest and is protected.' " id. p. 539.

On January 9, 1967, in a sweeping decision, *Time, Inc.* v. *Hill, supra*, the Supreme Court extended to *privacy cases* the protections and principles previously handed down in a series of *libel* cases, including *New York Times* v. *Sullivan*, 376 U.S. 254, *Garrison* v. *Louisiana*, 379 U.S. 64, and *Rosenblatt* v. *Baer*, 383 U.S. 75.

The constitutional protection afforded the press by the First Amendment is broad enough to cover the publication of so-called 'private' letters dealing with national public issues which, as the columns on their face show, both the writer and recipient discussed with public officials and others in the public arena.

3. Freedom of expression and discussion of public issues, public questions, public affairs and matters of public interest are secured by the First Amendment.

In a recent series of decisions, the Supreme Court said:

> "The central commitment of the First Amendment, as summarized in the opinion of the Court in New York Times v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) is that 'debate on public issues should be uninhibited, robust and wide open' ". *Bond* v. *Floyd*, 385 U.S. 116, 146.

and again:

> "Freedom of expression upon public questions is secured by the First Amendment." 376 U.S. at 269.

and again:

> "For speech concerning public affairs is more than self-expression: it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64 (pp. 74-75)

and again:

> "There is, first, a strong interest in debate on public issues and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Rosenblatt* v. *Baer*, 383 U.S. 75, 85.

and again at page 86:

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation, but in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth amendments. The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

So in this case where the interests in public discussion of civil rights and anti-Semitism are particularly strong, the Constitution should limit the protection afforded by the law of privacy as in *Time, Inc.* v. *Hill, supra,* or the rights of property as in *Marsh* v. *Alabama*, 326 U.S. 501. There should be no sanctions in any civil case concerning freedom of speech or press, no matter how it is labeled, unless actual malice is alleged and proved as defined in *New York Times* v. *Sullivan*, and *Garrison, supra;* that is to say, the statements were knowingly or recklessly false and made with a high degree of awareness of their probable falsity.

The right of privacy must give way to the right of the press to publish matters of public interest. *Afro-American*,

supra. Where there is a conflict between a public interest and a private interest the public interest must prevail, the private interest must yield.

The press should not be discouraged from exercising the constitutional guarantees. "Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill, supra,* p. 543.

4. The constitutional guarantees of freedom of speech and freedom of press are in a preferred position.

A broad concept of the constitutional guarantees of freedom of the press is essential to supply the public need for information and education with respect to the significant issues of the times. Civil rights clearly is a significant national issue, not limited to Watts, Harlem or Montgomery, Alabama.

It is in our tradition to allow the widest room for discussion, and the narrowest range for restriction. *Thomas* v. *Collins*, 323 U.S. 516, 530.

The constitutional rights of freedom of speech and freedom of religion have a preferred position. The constitution has put those freedoms in a preferred position. *Jones* v. *Opelika*, 316 U.S. 584, 608. Freedom of speech, freedom of press, freedom of religion are in a preferred position. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115. They have a preferred position as against the constitutional right of owners of property. *Marsh* v. *Alabama*, 326 U.S. 501, 509. "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." (id. 509).

It is beyond question that the rationale of *Time, Inc.* v. *Hill, supra*, puts First Amendment rights of freedom of speech and press in a preferred position as against rights of privacy. *Time, Inc.* at page 539.

Appellants' interest in privacy for their actions and racial sentiments did not give them an immunity from responsible newspaper discussion. In appraising challenged violations of privacy, a distinction can be made in favor of news items. *Afro-American Publishing Co.* v. *Jaffe*, 124 U.S. App. D.C. , 366 F. 2d 649, 654. "The right of privacy stands on high ground, cognate to the values and the concerns protected by constitutional guarantees. *But this must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy.* The courts are called upon here, as elsewhere in the law, to harmonize individual rights and community interests . . ." (id. p. 654) (Emphasis supplied)

In harmonizing the conflicting right of privacy with the right of the public to know and the freedom of the press to inform, the trial court balanced the scales in favor of freedom of the press. In so doing, we submit that it exercised a sound discretion; it did not abuse its discretion and the order appealed from should be affirmed.

II.

IS IT AN ACTIONABLE INVASION OF APPELLANTS' PRIVACY TO MAKE FACTUAL REPORTS OF THE CONTENTS OF, OR INFORMATION IN, SO-CALLED "PRIVATE" LETTERS DEALING WITH PUBLIC ISSUES, NEWSWORTHY EVENTS AND MATTERS OF LEGITIMATE PUBLIC INTEREST.

A. There Is No Actionable Invasion of Privacy on the Record in This Case.

1. Since the Supreme Court in the important case of *Time, Inc.* v. *Hill* applied the prevailing constitutional doctrine expressed in *New York Times*, a libel case, to a *private person* in privacy cases, the threshold question is can there ever be an actionable invasion of privacy in the absence of proof that the defendant falsely reported matters of public interest with knowledge that the report was false or in reckless disregard of the truth, that is to say,

with a high degree of awareness of probable falsity. Mr. Justice Brennan, speaking for the court, said: "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc.* v. *Hill,* at p. 542.

Mr. Justice Brennan went on to say: " 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed to enable members of society to cope with the exigencies of their period.' *Thornhill* v. *State of Alabama,* 310 U.S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Bridges* v. *State of California,* 314 U.S. 252, 269, 62 S. Ct. 190, 196, 86 L. Ed. 192." and at page 543: "Those guarantees [of the press] are not for the benefit of the press so much as for the benefit of all of us. A broadly designed freedom of the press assures the maintenance of our political system and an open society."

Pre-*Time, Inc.* v. *Hill* law recognized severe limitations for newsworthy events, *Garrison, supra,* p. 73, note 9, and "right of privacy" was held to give way to the right of the press to publish matters of public interest. *Afro-American, supra.*

It seems, as Professor Kalven suggests, that the recognized generous privilege to serve the public interest in news is so overpowering it has swallowed the tort of privacy. *Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?",* 31 Law and Contemp. Prob. 326, 335-336 (1966). *Time, Inc.* v. *Hill, supra,* at p. 540, note 7.

The interest of the public here clearly outweighs the interests of appellants. The protection of the public re-

quires not merely discussion but information. *Sweeney* v. *Patterson*, 76 U.S. App. D.C. 23, 128 F. 2d 457, 458 (1942).

2. The right to privacy is not an absolute.

This court so stated in *Afro-American*, at p. 653.

The right to privacy must give way to the right of the press to publish matters of public interest. *Afro-American*, and see cases cited by the Supreme Court as so holding in *Time, Inc.* v. *Hill*, p. 540, note 7.

We submit that anti-Semitism and racism are beyond question matters of legitimate public interest. Appellant Carto's interest in privacy or secrecy for his activities and racial views and sentiments did not give him an immunity from responsible newspaper discussion. The columns which Carto complains of discuss these views.

Let us consider who Carto is and his relationship to Liberty Lobby and its public activities. The record shows that Mr. Carto is the founder, organizer, and from the beginning has been and still is Treasurer of Liberty Lobby, paid by Liberty Lobby; he employed Hicks as Executive Secretary and authorized Hicks to sign checks for the Washington Observer. As Treasurer of Liberty Lobby, he is the superior officer of Hicks and no one keeps a record of Mr. Carto's presence or absence from the Washington office. As Treasurer he is in absolute control of the funds of Liberty Lobby. He is connected with the American Mercury which is now combined with the Washington Observer and is also connected with the Noontide Press.

Liberty Lobby is a pressure group, takes positions for or against legislation, seeks to guide public policy, seeks and receives funds from the public for that purpose, offers a service to the public for that purpose, invites readers and subscribers to write to their senators and congressmen on pending legislation, presents its views at legislative hearings, appeals for help to kill civil rights bills, suggests to

subscribers positions to take on national issues, organizes public opinion, is in the public arena, appeals to the public for support, engages in lobbying—one of its chief purposes being to expand its influence.

In *Afro-American, supra,* it was said of plaintiff Jaffe, a small drug store owner, that he "would appear to be a bigot" for canceling his subscription and discontinuing the sale of a negro newspaper in a predominantly negro neighborhood. Jaffe had discussed racial relations *privately, not publicly* with the editor of Afro.

It is submitted that if Jaffe's activities and privately disclosed racial sentiments did not give him immunity from newspaper discussion, *Afro-American,* p. 654, a fortiori neither should Carto's racial sentiments and views expressed in so-called "private" letters to a well known segregationist and writer give him immunity, Carto's intention clearly being that they should be discussed, as they were, by both writer and recipient with United States Senators one of whom in turn discussed them with nationally prominent Americans. The writer's right to privacy ceases upon publication of the facts.

It could hardly be said that appellees' columns were an unreasonable and serious interference with Carto's interest in not having his affairs and activities known to the public since Liberty Lobby, Inc. of which he is the head officer and paid Treasurer controlling its finances, is in the public arena, opposes civil rights legislation, is in a position where it can influence public issues, is dependent on the public for its basic financial support, and as the record plainly shows, Carto is Liberty Lobby.

Civil rights legislation is clearly a matter of legitimate public concern. The right of privacy . . . does not include protection from the publication of matters of legitimate public interest or general interest which is held to be dominant over the individual's desire for privacy. *Elmhurst* v. *Pearson, supra.*

As we have previously pointed out, in *Time, Inc.* v. *Hill*, 87 S. Ct. at 539, 540, note 7, the Supreme Court said: "Some representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest are *Afro-American Pub. Co.* v. *Jaffe*, 366 F. 2d 649 (C.A. D.C. Circ. 1966) . . . *Elmhurst* v. *Pearson*, 80 U.S. App. D.C. 372, 153 F. 2d 467 (1946)"

3. Liberty Lobby, a political action corporation, has no right to privacy.

We submit that Liberty Lobby, Inc., a corporation is not protected by the common law action for invasion of privacy. It is not a natural person and obviously cannot experience the emotions of outrage, embarrassment and humiliation. In right of privacy cases, the primary damage is the mental distress from having been exposed to public view; *Time* v. *Hill, supra,* at p. 541, note 9. The right of privacy "represents a vindication of the right of private personality and emotional security . . ." *Afro-American, supra,* at p. 653.

"Since the right of privacy is primarily designed to protect the feelings and sensibilities of human beings rather than to safeguard property, business, or their pecuniary interests, it would seem proper to deny this right to corporations and institutions. . . ." *41 Am. Jur.,* Privacy, Sec. 15.

Appellant Liberty Lobby has not been and cannot be injured in the manner it alleges and since such an injury is impossible, it is not entitled to a preliminary injunction designed to prevent it.

Corporations or natural persons engaged in public lobbying have no right of privacy with respect to such activities. By law they are required to register. Appellant Liberty Lobby and Carto, its paid Treasurer, as we will presently discuss, is an object of legitimate public interest because of its lobbying activities and its solicitation and receipt of

funds from the public and consequently has no right to a preliminary injunction against appellees Pearson and Anderson. *Elmhurst* v. *Pearson, supra.*

Furthermore, there are adequate remedies at law. If documents have been taken illegally from Liberty Lobby's files, it can turn the matter over to the police and prosecuting authorities. It can file a suit in replevin. It has known since its office manager "room-bugged" appellee Horne's conversation in its employee's (Pat Hill's) apartment on October 24, 1966, that the F.B.I. has copies of certain documents which it has failed to subpoena. It can protect the letters by copyright.

In the final analysis it would seem that a corporation, a lobbying pressure group devoted to influencing the political opinions of the public and its elected representatives, which finds itself outraged, embarrassed and humiliated by publication of information related to its political views, purposes, objectives and methods of money raising, has an obvious remedy outside the courts. Such an organization's remedy is not an injunction against appellees Pearson and Anderson, but rather, to adopt political views, purposes, objectives and methods that it is not ashamed to disclose to those it seeks to influence. By the same token the above remarks are equally applicable to appellant Carto.

4. The principle which protects personal writings is not the principle of private property but that of privacy.

The early authorities chiefly relied on by appellants involving publication of letters in violation of a property right in them are not in point, especially since *Time, Inc.* v. *Hill.* Even if they were in point, they are clearly distinguishable since there the facts were private facts concerning the private life, habits, acts and relationships of an individual, the revelations in many cases being so intimate and unwarranted as to outrage the community's notions of decency. Here the facts disclosed are in the public domain,

and concern ideas and activities plainly affecting the social and economic structure of this nation, in which the public is plainly interested.

The rationale of these early English cases is that the writer has a property right in the contents of private letters which the courts will protect against publication without his consent.

Today the courts have discarded the principle of a property right in private letters as an outmoded basis. *Hazlitt* v. *Fawcett Publications*, 116 F. Supp. 538, 543. See *Bernstein* v. *Nat'l Broadcasting Co.*, 129 F. Supp. 817, 831.

Here appellant Carto asserts wrongful invasion of privacy, since private letters were published without his consent, and irreparable damage if other unspecified letters are published.

We must keep in mind that Carto did not verify his amended complaint, did not sign it, did not file an affidavit and did not give evidence, although he had ample time to do so. The amended complaint fails to set out the specific facts required by F.R. Civ. P. 65(b); it contains only general allegations that certain material is the property of Carto. In such circumstances, more so in the absence of any proof of ownership or damages, a complainant is not entitled to issuance of a blanket preliminary injunction against defendants' publishing unnamed and unidentified papers said to be Carto's property. *Knights of the Ku Klux Klan* v. *International Magazine Co.* (2nd Circ.) 1923, 294 F. 661, 663, certiorari denied 263 U.S. 719, 68 L. Ed. 522, 44 S. Ct. 181.

However, let us assume arguendo, that Carto owns the letters, that they are not the property of Liberty Lobby as W .B. Hicks, Jr., the executive secretary, categorically says they are (Complaint, para. 7 JA 3), and later hedged on in his affidavit (JA 20) by saying the letters belonged either to Liberty Lobby or to Carto, and that

one or the other had a property right in the letters. The principle of property is a fictional one. What is protected is the right of privacy, not the right of property; (and freedom of the press occupies a preferred position as against the constitutional rights of owners of property. *Marsh* v. *Alabama,* supra)

"In their famous article in 1890, Brandeis and Warren pointed out that what was actually a right of privacy had been protected by the courts for years under other names—property interests, contractual rights, trust relationships, etc., and that the time had come to recognize the fictions for what they were, and enforce the right of privacy on its own." *Feinberg, The Law of Privacy,* 48 Col. L. Rev. 713, at 714, 715.

The Warren-Brandeis article said "The principle which protects personal writings and all other personal productions, not against *theft or physical appropriation* but against publication in any form, is in reality not the principle of private property but that of an inviolate personality." 4 Harv. L. Rev. at p. 205. (Emphasis supplied)

So today the protection of personal private letters has become part of, not apart from, the law of privacy as a whole which must give way to the right of the press to publish matters of public interest.

Let us examine the nature of the private facts revealed in some of the early cases on which appellants chiefly rely and the facts revealed here. No facts are set out in *Pope* v. *Curl* as reported in 2 Atk. 342, 26 Eng. Reports. In *Gee* v. *Pritchard,* the real injury was invasion of privacy, the plaintiff praying the court to protect her "wounded feelings". The facts in both *Gee* and *Stanhope* v. *Thompson* concerned in the main illegitimate sons.

The facts revealed here are not private facts dealing with the intimate details of Carto's private life. Carto is not a father writing to his illegitimate son, nor to a love-

lorn widow as in *Breckenridge;* he is the Treasurer of a registered lobbyist writing to an anti-Negro extremist about the rising and openly expressed anti-Jewish feeling in the south, the repatriation of Negroes, and civil rights, which were facts discussed with several United States Senators and others by both Carto and Brady.

These are not private facts; they are facts in the public domain. They relate to Carto's prejudices, with whose affairs the public has a legitimate concern (4 Harv. L. Rev. at p. 214) for "In some sense each person's prejudices involve a matter of importance to the whole community." *Afro-American, supra,* at p. 657.

Even before *Time, Inc.* v. *Hill,* in a comprehensive article dealing with the very authorities on which appellants seemingly base their entire case, it was suggested that "the proper treatment in suits to enjoin publication of letters would be to balance any existing public interest against any damage which publication would cause the sender and allow publication when the former outweighs the latter". 44 Iowa Law Review (1959) 705-713. See also *Bernstein* v. *Nat'l Broadcasting Co.,* 129 F. Supp. 817, at p. 831. *We must keep in mind that Carto has made no showing of damage.*

It seems, in a balancing test of whether or not the publication of private letters should be enjoined, that as Prosser suggests "very probably there is some rough proportion to be looked for, between the importance of the public figure or the man in the news, and of the occasion for the public interest in him and *the nature of the private facts revealed.*" *Prosser, Torts,* 3d Ed. p. 849 (Emphasis supplied).

Clearly the contents of the letters involved in this case are not private, since as the columns plainly show, the contents had been discussed with members of the United States Senate and other prominent Americans in eight or

ten Southern states which was the implied intention of the writers, and dealt then as now with current newsworthy facts—anti-Semitism, racism, and civil rights. There is a logical relevant connection between the information published in the columns and current newsworthy facts, between what Carto claims as private facts and current events. Both deal with civil rights which, beyond question, is one of the major issues of our time.

Furthermore, a person may lose the right of privacy by entering into a business or calling which gives the public a legitimate interest in his character, activities or affairs. *72 C.J.S. p. 413.*

"Any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public, submits his private life to examination by those to whom he presents his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to grant to him the approval or patronage which he seeks." *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 72.

It is submitted that the facts contained in the letters and reported in the columns are clearly in the public domain.

5. The right to privacy ceases upon publication of the facts.

In any event we submit the matter is now moot, since the right to privacy ceases upon the publication of the facts by the individual or with his consent. *Warren and Brandeis*, page 218; *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817, affirmed 98 U.S. App. D.C. 112, 232 F. 2d 369, cert. den. 352 U.S. 945, 77 S. Ct. 267, 1 L. Ed. 2d 239 (1955). The affidavit of appellee Pearson (JA 34-37) clearly shows that the facts of which appellants complain were published in the November 15, 1966 issue of the Washington Observer with the knowledge and consent of appellant Carto and as the record below clearly shows, were widely discussed and debated by prominent Americans

including members of the United States Senate, one of whom is now chairman of the Senate Judiciary Committee.

CONCLUSION

The court below was correct in denying injunctive relief for appellants. Such relief may be granted only if it clearly appears from specific facts shown by affidavit or by the verified complaint or by competent evidence that immediate and irreparable injury, loss or damage will result. The only evidence of damage offered by Liberty Lobby was two days loss of time—maybe other days. Carto offered no evidence of damage. He filed no affidavit; he neither signed nor verified the amended complaint.

The right of privacy must give way to the right of the press to publish matters of public interest and that right ceases upon publication by the writer or with his consent.

The factual reporting of newsworthy persons and events is in the public interest and is protected. There is no actionable invasion of privacy here and there can be none in the absence of proof that the defendants, appellees, published reports with knowledge of their falsity or in reckless disregard of the truth.

Freedom of the press occupies a preferred position. The protection of the public requires not merely discussion but information. The interest of the public in information about a registered lobbyist and its founder and treasurer here clearly outweighs the private interest of the lobbyist's treasurer in secrecy.

The order appealed from should be affirmed.

Respectfully submitted,

JOHN DONOVAN
729 Fifteenth St. N.W.
Washington, D. C. 20005
Attorney for Appellees

APPENDIX

APPENDIX

Defendants' Exhibit No. 2
(Hicks' Deposition)

WASHINGTON OBSERVER
NEWSLETTER

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety"
—BENJAMIN FRANKLIN

Number 25

September 15, 1966

• • • • • • • • • • •

A very limited number of complete sets of all WASHINGTON OBSERVER since issue Number 1 are available for $20 each. Please send order to MERCURY/OBSERVER, P. O. Box 7213; Houston, Texas 77008.

• • • • • • • • • • •

The WASHINGTON OBSERVER NEWSLETTER is published semi-monthly except March 1, June 1, September 1 and December 1 when subscribers receive the quarterly magazine; THE AMERICAN MERCURY. Subscription rate for the MERCURY/OBSERVER package: $10 for one year, $15 for two years, $20 for three years. Extra copies of the OBSERVER, 10¢ each. Permission to quote granted provided the OBSERVER is given as the source. Editor, Lee Roberts, P.O. Box 9061, Washington, D. C. 20003. Send all business correspondence to P.O. Box 7213, Houston, Texas 77008.

Defendants' Exhibit No. 3
(Hicks' Deposition)

LIBERTY LOBBY 1955-1965

300 Independence Ave., S.E., Washington, D. C. 20003

A Special Tenth Anniversary Report Designating July As Booster Month. Liberty Lobby's Goal: 250,000 Subscribers.

June 18, 1965

Dear Friend:

The defeat of Conservatism last November was far more serious than many have thought. And 1966 could result in another defeat just as bad. The facts must be faced because, if faced with truth and courage, many rays of hope will be seen shining through.

> One major bill after another has gone marching through Congress, behind that master major domo, Lyndon B. Johnson. Aid to Education . . . Appalachia . . . Civil Rights . . . Disarmament . . . Gold Reserves . . . a host of others. Bills that would each be considered a major defeat for Conservatives under a less skilled manipulator, become commonplace under LBJ. And they keep coming! Mass Immigration . . . Poverty Program Expansion . . . Voting Rights . . . Medicare . . . Foreign Aid . . . Planning for Peace . . . Firearms Restrictions . . . Repeal of Right to Work . . . Federal Housing . . . and so on. The "Great Society" of the very rich and the very poor is being legalized by the force of law and vitalized by the money of middle-class taxpayers.

Of Those Who Fight

In spite of the facts above—which no one can deny—there also is the fact that since the Great Society juggernaut began pressing relentlessly forward in November there has never been such hopeful ferment of new ideas, activity and planning among Conservatives! This is especially

true at the Liberty Building in Washington where LIBERTY LOBBY occupies the busy, 10-room second floor.

• • • • • • • • • • •

BOOSTER MONTH

As announced in the July issue of *Liberty Letter*, LIBERTY LOBBY is ten years old this July. It was in 1955 that the idea of LIBERTY LOBBY was conceived, and today the idea lives and breathes. And tomorrow—with your help—LIBERTY LOBBY will achieve its long-sought goal: making Conservatives the most powerful pressure group in America!

• • • • • • • • • • •

TEN YEARS OF HISTORY

have proven LIBERTY LOBBY. What it sets out to do, it does. It is not fly-by-night, inexperienced or lacking in purpose. It does not attempt the impossible. It does not waste money. Its path ahead is as clearly marked today as it was ten years ago. Nothing has changed except that now the promise of LIBERTY LOBBY is more vivid and attainable than ever before.

> This promise is sealed and consecrated by faith. YOU KNOW, with no doubt whatsoever, that we will do our part. And WE KNOW that enough subscribers and contributors and Pledgers will continue to back us up to fulfill the promise of the Original Plan.

Please return the enclosed coupon without delay. List all the names of Conservatives you know who do not already subscribe to *Liberty Letter*, and send a dollar per name • • •

• • • • • • • • • • •

Yours, with sincere thanks in advance for your help,

W. B. HICKS, JR.
W. B. Hicks, Jr.
Executive Secretary

• • • • • • • • • • •

There are also LIBERTY LOBBY's special projects carried through in addition to regular legislative work. The most notable so far has been the 12-page tabloid, *LBJ: A Political Biography*, which attained the largest circulation of any political document of any time—over ten million copies! There was the 50-page book, *The Moscow Treaty, The Ev & Charlie Show, J. William Fulbright: Freedom's Judas Goat*, the *Liberty Ledger* (voting records), the *Congressional Handbook* and the very influential *Conservative Victory Plan*—all of which were products of painstaking, original research and investigation. Today, two other special projects are quietly under way; both of them will be mailed free to all subscribers before the end of the year, if finances will permit.

• • • • • • • • • •

Defendants' Exhibit No. 13
(Hicks' Deposition)

LIBERTY LIBRARY

LIBERTY LOBBY'S PUBLICATIONS:

• • • • • • • • • •

—J. WILLIAM FULBRIGHT: FREEDOM'S JUDAS GOAT. *How a Powerful Senator Leads America to Destruction.* LIBERTY LOBBY's newest depth charge. The peculiar record of this powerful Senator exposed to the light of day for the first time. Fully documented; absolutely irrefutable. One copy, 50¢; 5 for $2; 10 for $3; 100 for $25; 1,000 for $200.

—LBJ: A POLITICAL BIOGRAPHY. Over 14 million copies distributed in 5 months! The most widely-read political document of all time. Now more valid than ever before. New low quantity price. 10 for $1 (Postpaid); 500 for $7.50 (Express Collect from Washington or San Francisco).

• • • • • • • • • •

—How to Write Your Congressman. Simple but important pointers on a vital subject. 25 copies, $1.

• • • • • • • • • •

Defendants' Exhibit No. 14
(Hicks' Deposition)

• • • • • • • • • •

This is the third time in three years that a so-called "Civil Rights Package" has been laid before the Congress . . . and the third time that Liberty Lobby has found it necessary to offer all-out opposition to the power-grabs of Lyndon Baines Johnson and Nicholas Katzenbach, who will never rest until they control the daily lives of all Americans.

Liberty Lobby's 60,000 subscribers were unable to make a dent in the 1964 Bill. The efforts of 120,000 subscribers were enough to merely delay the 1965 Bill. But . . . now . . . there are nearly 200,000 subscribers, and . . .

we intend to KILL the 1966 Bill!

• • • • • • • • • •

It *can be defeated.* Here is how you can help:

• • • • • • • • • •

Spread the word about the true meaning of this so-called "Civil Rights Package" and its potential effects on everyone who rents *from*, or sells or rents *to*, others. Write your Congressman and Senators.

• • • • • • • • • •

Our initial strategy is to stop the Bill in the Rules Committee of the House and the Judiciary Committee of the Senate. Here's what to do:

(1) WRITE YOUR CONGRESSMAN AND HAVE YOUR CONTACTS DO THE SAME. Express your thoughts about the Bill and urge him to fight it. Make a carbon copy of your letter and send it to Judge Howard

Smith, Chairman, Rules Committee, Room H 313, Capital Building, Washington, D. C.

(2) IF YOUR SENATOR IS ON THE JUDICIARY COMMITTEE, try to flood his office with letters and wires *from his constituents* protesting this bill. The members of the Committee are: Chairman, James O. Eastland (Miss); John L. McClellan (Ark); Sam J. Ervin, Jr. (NC); Thomas J. Dodd (Conn); Philip A. Hart (Mich); Edward V. Long (Mo); Edward M. Kennedy (Mass); Birch Bayh (Ind); Quentin N. Burdick (ND); Joseph D. Tydings (Md); George A. Smathers (Fla); Everett McK. Dirksen (Ill.); Roman L. Hruska (Neb); Hiram L. Fong (Hawaii); Hugh Scott (Pa); Jacob K. Javits (NY).

(3) IF NEITHER OF YOUR SENATORS ARE ON THE COMMITTEE, write both of them a letter and urge them to fight the bill with all they have. Make carbons of your letters and send them to Senator Eastland, the Chairman of the Senate Judiciary Committee.

* * * * * * * * * *

Defendants' Exhibit No. 22
(Hicks' Deposition)

LIBERTY LOBBY

Headquarters Office:
825 Dupont Circle Building
Washington 6, D.C.
Phone: CO 5-8378

A Word From the Treasurer

October 11, 1961

Dear Friend:

With some 400 enthusiastic guests present, the National Conservative Coalition Conference, sponsored in Chicago by the LIBERTY LOBBY, was a smashing success.

(1) This event marks the first time in American history, I think, when leading figures from both parties came together and jointly advocated and promoted the conservative Coalition in Congress as the political means to save America. *They thus repudiated the bosses of both liberal-dominated parties.*

(2) The *prestige* of the Coalition was greatly enhanced, and this will substantially aid conservatives in Congress, next year. No longer will liberals dare to ridicule congressmen who vote with the Coalition, nor can they now seek to make it appear as if statesmen who repudiate the petty party bosses are "immoral" for putting their country above their party.

(3) The LIBERTY LOBBY has proven that the Coalition is *the vehicle to use to save America.* Through the Coalition, the LIBERTY LOBBY will now inspire a true UNIFICATION of action of all conservative groups.

(4) The publicity gained helped the LIBERTY LOBBY itself to become better known.

• • • • • • • • • •

THE HIGH POINT

In spite of the excellence of the speeches by all three congressmen, the high point in the affair came when our prominent Board of Policy member, Billy James Hargis, presented the Statesman of the Republis Citation to Messrs. Berry and Dorn. • • •

• • • • • • • • • •

THE INCREASING BURDEN

The success in Chicago, and the successes we are heading for, have not been easily bought. The burden on the officers of the organization has been enormous—and especially so because of the chronically weak and uncertain financial condition.

(1) The Chicago Conference has left a great deficit. * * *

* * * * * * * * * *

In short, your help is needed—your generous and regular help. If you can pledge, please do so. Or make a single contribution. Or purchase tapes of the Conference. *And by all means, send in gift subscriptions for your friends.* Whatever you do, you will be making an investment in the future of America. Remember, the only way to defeat the Enemy is through political action in Washington.

Yours, for *TWO* Liberty Lobbyists,

WILLIS A. CARTO
Willis A. Carto
Treasurer

* * * * * * * * * *

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

458

No. 20,730

CHARLES F. WARE, APPELLANT

v.

PAUL H. PRESTON, et al., APPELLEES

Appeal from the United States District Court

for the District of Columbia

Patricia W. Weinberg
419 6th Street, N.W.
Washington, D.C.

Attorney for Appellant
(Appointed by this Court)

QUESTION PRESENTED

Did the District Court err in denying appellant's pro se petition for habeas corpus without a hearing, findings of fact or conclusions of law, where appellant alleged that failure to provide him with counsel at his preliminary hearing prejudiced his defense?

INDEX

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Appellant appeals from an order of the United States District Court for the District of Columbia denying his petition for habeas corpus without a hearing, opinion, findings of fact, or conclusions of law. The order was entered on March 10, 1966 by Sirica, J.

Appellant's pro se petition for leave to appeal without prepayment of costs was filed on March 11, 1966 and denied on March 16 by Sirica, J. Appellant filed a pro se petition for leave to appeal without prepayment of costs in this Court on March 23, 1966.

On July 7, 1966, this Court allowed appellant to proceed on appeal without prepayment of costs and further ordered that the appeal be held in abeyance pending decision by this court in Brooks v. United States, No. 20, 239 or until further order of the Court. That part of the order of July 7, 1966 holding the appeal in abeyance was vacated by order of this Court on March 23, 1967 and present counsel was appointed by this Court on May 17, 1967. The original record in District Court H. C. No. 95-66 was ordered transmitted to this Court from the District Court on January 20, 1967. The complete record in District Court Criminal Case No. 596-64, United States v. Ware, was ordered transmitted as a supplemental record on appeal in this case by order dated June 20, 1967.

The jurisdiction of this Court is founded on 28 U. S. C. §1291.

STATEMENT OF THE CASE

A. Petition for habeas corpus

Appellant is presently in custody serving two concurrent sentences of 10 years, imposed by Pine, J., for violation of 26 U.S.C. §§4704(a) and 4705(a), in United States v. Ware, District Court Criminal Case No. 596-64. His conviction was affirmed by this Court. Ware v. United States, 123 U.S App. D.C. 34, 356 F.2d 737 (1965); cert. denied, 383 U.S. 919 (1966).

On February 24, 1966, appellant filed a pro se petition for habeas corpus alleging, in effect, that his detention was illegal and that his conviction was invalid because of denial of his constitutional and statutory rights to counsel at preliminary hearing.

The habeas corpus petition alleged that when appellant was taken before the United States Commissioner for the District of Columbia for a preliminary hearing, he was without counsel and unaware that, being indigent, he had a right to have counsel appointed for him. The petition further alleged that appellant had taken the stand at the preliminary hearing in a futile effort to help his codefendant and, on cross-examination, had made damaging admissions. "So under these circumstances," he alleged, "I was stripped of my defence of innocence before I arrived for trial."

The District Court, Sirica J., denied the petition, without a hearing and without opinion, findings of fact or conclusions of law.

Ware v. Preston, Habeas Corpus No. 95-66 (Order filed March 10, 1966).*

B. The Preliminary hearing and trial

Appellant and one Lovett Powell were brought before the United States Commissioner on May 8, 1964, pursuant to warrants of arrest charging narcotics offenses under 26 U.S.C. §§4704(a) and 4705(a). Commissioner's Docket No. 13 Case No. 80, United States v. Ware, and Case No. 79, United States v. Powell.**

The Commissioner's Record of Proceedings, C.D. No. 13 Case No. 80, indicates that appellant "was informed of the complaint and of his right to have a preliminary hearing and to retain counsel." (Emphasis supplied.) Appellant requested "a hearing now" but at the request of the

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*Prior and subsequent to filing the habeas corpus petition in the instant case, appellant filed pro se motions under 28 U.S.C. §2255, raising broadly the same issues as are presented here. Ware v. United States, District Court Civil Action No. 161-66 and Ware v. United States, District Court Civil Action No. 1005-66. Both motions were denied without a hearing. Leave to appeal without prepayment of costs was denied by the court below in both cases.

**The complete record in District Court Criminal Case No. 596-64, United States v. Ware, was made part of the supplemental record on appeal. See p. 1, infra. All record and transcript citations, unless otherwise indicated, are to the record and files in D.C. Crim. Case No. 596-64. The Commissioner's Record of Proceedings is hereinafter cited as C.D. No. 13 Case No. 79 or Case No. 80. No transcript or tape recording was made of the hearing. At trial, during a voir dire examination, the Commissioner and appellant testified as to what occurred at the preliminary hearing. Transcript references to the trial are hereinafter cited as Tr.

government the case was continued to May 12 to allow the government to bring in a necessary witness. Appellant was committed to jail in lieu of $2500 bond. At the preliminary hearing on May 12, Pvt. Hampton of the Narcotics Squad testified that narcotics were handed to him by Ware, who directed that payment be made to Powell.

The Commissioner's Record of Proceedings shows that, at the close of the government's case, "Def. Ware - after two additional warnings in re his constitutional rights choice (sic) to testify solely as a witness for co-def. - Powell." Appellant's testimony, as summarized in the Record of Proceedings in United States v. Powell, C.D. No. 13 Case No. 79, was to the effect that: "Powell did not know anything about this sale and if it took place and if Powell took any money it was merely as a convenience because of where he sat in the auto." Probable cause was found to hold both defendants for action of the grand jury and they were committed to D.C. Jail in lieu of $2500 bond.

Defense counsel did not learn that appellant had made a damaging statement at the preliminary hearing until the day preceding trial. (Tr. 4) The government had originally intended to call the Commissioner to testify to what it construed as a "judicial admission" by appellant as part of its case in chief. (Tr. 95-96) But following a lengthy voir dire examination (Tr. 101-30) as to what transpired at the hearing, the government withdrew the proffered testimony. (Tr. 148) The court did not rule as to whether the statements would have been admissible as direct evidence nor, since appellant did not take the stand, did it rule as to whether the

statements would have been admissible for impeachment purposes.

The voir dire examination confirms the Commissioner's Record of Proceedings to the effect that appellant was informed of his right to retain counsel (Tr. 107, 119) but not of his right to appointed counsel. (Tr. 130) The Commissioner testified that appellant "asked a question or two" on cross-examination (Tr. 121). After being warned of his right not to testify and that his "testimony could be used against him at that or any other hearing" (Tr. 112), appellant "said that he actually wanted to take the stand to testify strictly on behalf of his co-defendant Powell." (Tr. 112) The Commissioner testified that "in substance the sum total of his statement" was that "as far as any passing of money was concerned to Mr. Powell, he didn't recall that such a thing took place, but if it did take place, that Powell didn't know anything about the sale that was involved, and that if he did it, it could have been strictly as a matter of convenience." (Tr. 114)

The Commissioner further testified that when the government cross-examined appellant as to the transaction: "the reply by Mr. Ware was, in substance, that he passed the narcotics to Detective Hampton, but when he passed the narcotics to Detective Hampton, that Powell had gone into a drugstore to get some needles, and that the money received was given to him, Ware." (Tr. 115)

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

United States Constitution, Amendment V, provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . "

United States Constitution, Amendment VI, provides:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Title 2, Section 2202, D.C. Code, 74 Stat. 229, provides:

"The [Legal Aid] Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia, and in preliminary hearings in felony cases, and . . . in proceedings before . . . the United States Commissioner.

. . . Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

Rule 5(b) of the Federal Rules of Criminal Procedure provided at the time this case arose:

"Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Rule 5(c) of the Federal Rules of Criminal Procedure provides:

"Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable

> time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Rule 44 of the Federal Rules of Criminal Procedure provided at the time this case arose:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

STATEMENT OF POINTS

1. Lack of counsel at preliminary hearing deprived appellant of his right to counsel under The District of Columbia Legal Aid Act, 2 D.C. Code §2202 and the Sixth Amendment.

2. Failure to inform appellant of his right to appointed counsel at preliminary hearing resulted in his being discriminated against on the ground of poverty, denying him the equal protection of the laws, in violation of the due process guarantee of the Fifth Amendment.

3. Violation of appellant's rights to counsel and to equal protection warrants vacating the conviction on the existing record. Alternatively, the case should be remanded for an evidentiary hearing on the extent of prejudice resulting from denial of these rights.

With respect to each of these points, appellant requests the Court to read pp. 96-130, 143 of the trial transcript and the Commissioner's Record of Proceedings in United States v. Ware, District Court Criminal Case No. 596-64.

SUMMARY OF ARGUMENT

I

Appellant in this case, like the appellant in Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 330 U.S. 944 (1965), was informed of his right to retain counsel at the preliminary hearing but not of his right, if indigent, to have counsel appointed. In Blue, this Court held that The District of Columbia Legal Aid Act, 2 D.C. Code §§2201-10, requires that defendants appearing for preliminary hearing be informed not only of their right to retain counsel but also of their right to have counsel appointed if they are without funds. Appellant was therefore deprived of his statutory right to counsel.

The Sixth Amendment guarantees the accused the right to counsel "at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). The right attaches not only at trial, see Gideon v. Wainwright, 372 U.S. 335 (1963), but also at preliminary proceedings where these are "critical" to the defense. See Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 87 S. Ct. 1926 (June 12, 1967).

Appellant contents that the preliminary hearing is a critical stage in the accusatory process at which an accused needs the assistance of counsel. The need for the assistance of counsel at preliminary hearing has been recognized by Congress not only in The District of Columbia Legal Aid Act, supra, but more recently in the legislative history of the Criminal Justice Act of 1964, 18 U.S.C. §3006A. Without counsel, an accused does not know whether to ask for a hearing or waive it; if a hearing is held, he does not know how to cross-examine the government's witnesses, whether to testify himself, nor whether to ask that a transcript be made of the hearing. See Silverstein, Defense of the Poor: I. The National Report 76 (1965).

The facts in the instant case, appellant contends, demonstrate the need for counsel at preliminary hearing. At the hearing, appellant took the stand in a futile attempt to help his codefendant and, on cross-examination, made damaging statements. (Tr. 112, 114, 115)

II

Appellant contends that the guarantee of equal protection of the laws, as well as the Sixth Amendment, requires that an indigent accused be told not only of his right to retain counsel but also of his right to appointed counsel at preliminary hearing. Were it otherwise, an "invidious discrimination" would arise between defendants who can afford to retain counsel and those who cannot. See Ricks v. United States, 113 U.S. App. D.C. 216, 219 n.2, 334 F.2d 964, 967 n.2 (1964); Chester v. California,

355 F.2d 778, 781 n.1 (9th Cir. 1966). The issue was not squarely presented in either of those cases but each referred to Griffin v. Illinois, 351 U.S. 12 (1956), where the Supreme Court held that "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Id. at 17. Since appellant in the instant case was without funds, he asserts that the issue is properly raised here.

III

Appellant asserts that the right to counsel at the preliminary hearing is one of those rights "so basic to a fair trial that [its] infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (February 20, 1967). Thus there would be no occasion for inquiry into the question of prejudice resulting from deprivation of counsel and the conviction in the instant case should be vacated on the record now before the Court.

If, on the other hand, the Court believes that the question of prejudice is relevant, then appellant contends that the "harmless error" rule for federal constitutional issues, laid down in Chapman, is applicable. The present record, he alleges, indicates that the government is unable to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. See also Anderson v. United States, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965). If the Court concludes that the present record is inadequate to determine whether the requisite standard of prejudice is satisfied, then appellant prays that the case be remanded for an evidentiary hearing on the extent

of prejudice resulting from denial of appellant's constitutional rights.

The issues in the instant case are properly raised on collateral attack and the court below erred in denying the petition without a hearing, findings of fact or conclusions of law.

ARGUMENT

I

PETITIONER WAS DEPRIVED OF HIS STATUTORY AND SIXTH AMENDMENT RIGHTS TO COUNSEL AT THE PRELIMINARY HEARING

A. The District of Columbia Legal Aid Act confers a statutory right to counsel at the preliminary hearing

Appellant in this case, like the appellant in Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944 (1965), was informed by the United States Commissioner of his right to retain counsel at the preliminary hearing, but not of his right to have counsel appointed. (Tr. 107) In Blue, this Court held that in light of The District of Columbia Legal Aid Act, 2 D.C. Code §§2291-10, enacted by Congress in 1960, defendants appearing for a preliminary hearing have the right to be informed by the Commissioner that counsel may be appointed if they are without funds.*

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*2 D.C. Code §2202 provides:

"The [Legal Aid] Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases and . . . in proceedings before . . . the United States Commissioner.

. . . Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

This ruling was recently reiterated in Dancy v. United States, 124 U.S. App. D.C. 58, 60, 361 F.2d 75, 77 (1966), where the Court noted:

> "As the government states in its brief, he [appellant] should have been informed by the Commissioner that if he desired a lawyer and was unable to retain one, the Commissioner could assign one to represent him."

Since the decisions in Blue and Dancy, it is clear in this jurisdiction that a defendant must be told prior to preliminary hearing of his right not only to retain counsel, but of his right, if he is without funds, to have counsel assigned. Since the amendment to Rule 5(b) of the Federal Rules of Criminal Procedure, this requirement is also clear in all federal jurisdictions.*

The preliminary hearing in this case was held prior to the decision in Blue. See Part III section F of the Argument, infra, where the issue of retroactivity is discussed. The appropriateness of collateral attack to correct denial of this statutory right to counsel is discussed infra, Part III section E.

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*Since the decision in Blue, supra, and the preliminary hearing in this case, Rule 5(b) of the Federal Rules of Criminal Procedure has been amended to read: "The Commissioner shall inform the defendant . . . of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination . . ." (new material underlined).

B. The Sixth Amendment requires that counsel be made available to the defendant at every "critical stage" in the accusatory process

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The holding of the Supreme Court in Powell v. Alabama, 287 U.S. 45, 69 (1932), that an accused has the right to counsel "at every step in the proceedings against him" was elaborated by this Court in Edwards v. United States, 78 U.S. App. D.C. 226, 228-29, 139 F. 2d 365, 367-68 (1943), cert. denied, 321 U.S. 769 (1944):

> "The phrase, every step of the proceedings, does not refer to mere lapses of time. It contemplates effective aid of counsel in the preparation and trial of the case. It is true that denial, for a long time, of opportunity for conference and consultation with counsel, might result in a deprivation of the Constitution's guarantee of assistance. Ordinarily this would be manifested by inadequate representation at the preliminary hearing, at the arraignment, during the progress of the trial, or in connection with the filing of notice of appeal . . . "

The indication in Edwards that the right to counsel extends at least to some preliminary proceedings, has been reaffirmed in recent cases. See Hamilton v. Alabama, 368 U.S. 52 (1961) (right to counsel at an arraignment where this is a critical stage at which defenses must be asserted); White v. Maryland, 373 U.S. 59 (1963) (right to counsel at preliminary hearing where defendant entered plea of guilty); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel at custodial interrogation); United States v. Wade, 87 S. Ct. 1926 (June 12, 1967) (right to counsel at police line-up).

In Wade, supra, the most recent Supreme Court opinion to

consider the right to counsel, the Court pointed out that

> "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. The guarantee . . . encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" Id. at 1931.

The Court went on to hold that the police identification line-up was a 'critical stage" at which the accused, absent "intelligent waiver", must be represented by counsel. Id. at 1937.

In Miranda, supra, the Supreme Court held that the right to counsel attaches during police interrogation of an accused. It would be ironic indeed to hold that counsel must be available when an accused is questioned by police and when he is put in a police identification line-up, but not when the same person is questioned by the prosecuting attorney in a judicial proceeding, as occurred in the instant case.*

Fully applicable to the preliminary hearing is the principle enunciated in Wade:

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*See Segal, Some Procedural and Strategic Inequities in Defending the Indigent, 51 A.B.A.J. 1165, 1166 (1965): "If a constitutional right to counsel is to be recognized at the stage at which the case is still under investigation, it is difficult to escape the conclusion that there is an absolute right to counsel at the point where the prosecution is officially instituted in a court before a magistrate."

> "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial." 87 S. Ct. at 1932 (footnote omitted).

C. The preliminary hearing is a "critical stage" at which the right to counsel attaches

Prior to the recent decisions in Miranda v. Arizona, 384 U.S. 436 (1966) and United States v. Wade, 87 S. Ct. 1926 (June 12, 1967) extending the right to counsel to critical stages before the accused makes his first appearance before the committing magistrate, the Supreme Court considered in a number of cases whether preliminary judicial proceedings may themselves be a critical stage at which the right to counsel attaches.

In Hamilton v. Alabama, 368 U.S. 52 (1961), the Supreme Court held that arraignment in Alabama "is a critical stage in a criminal proceeding" since defenses may be "irretrievably lost" if not there asserted and since pleas are accepted at that stage. Id. at 53, 54. In White v. Maryland, 373 U.S. 59 (1963), the Court held that the preliminary hearing at which petitioner pleaded guilty was a critical stage and petitioner should have been represented by counsel. In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court reserved the question whether failure to appoint counsel to represent the defendant at the preliminary hearing unconstitutionally denied him the assistance of counsel. Preliminary hearing testimony of a witness who did not attend the trial was introduced at trial and under the circumstances this was held to be reversible error.

The critical nature of the preliminary hearing and the accompanying

need for counsel have been increasingly recognized by legal scholars, legislators, and the courts. The American Bar Foundation study on "The Defense of the Poor" states:

> "Apart from the possibility of a constitutional requirement, it seems clear that counsel should be present at the preliminary hearing, since the defendant without counsel at that stage is at a tactical disadvantage. . . . First, he does not know whether to ask for the hearing or waive it. If the hearing is held, he does not know how to cross-examine the state's witnesses or whether to testify himself. He does not know whether to ask that a record be made of the hearing. He does not know the requisite legal elements of the offense with which he is charged, nor of lesser related offenses, so he is unable to discuss intelligently with the prosecutor possible reduction or dismissal of the charges." Silverstein, Defense of the Poor: I. The National Report, 76 (1965) (emphasis supplied).

See also Beaney, The Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771, 781 (1961) (the appointment of counsel is the "minimum protection" that should be afforded an accused); Hunvald, Right to Counsel at the Preliminary Hearing, 31 Mo. L. Rev. 109 (1966).

In recent years, Congress has twice recognized the need for counsel at the preliminary hearing. In 1960, with the passage of The District of Columbia Legal Aid Act, 2 D.C. Code §§2201-10, Congress provided that "The [Legal Aid] Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases." 2 D.C. Code §2202. Assignment of counsel was to be "as early in the proceeding as practicable." Id.

The legislative history of the Criminal Justice Act of 1964, 13 U.S.C. §3006A (1964), abounds with recognition that the preliminary hearing

is a critical stage of the proceedings, at which defendants without counsel are seriously disadvantaged. The then Attorney General Robert F. Kennedy, spoke of the need "to insure that the individual was properly represented at the Commissioner level . . ." Hearings on S. 63, S. 1057, Before the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 25 (1963). Professor Allen, Chairman of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, gave it as his

> "view and the view of the Attorney General's Committee that the failure to provide appointment of counsel in the preliminary stages is one of the greatest deficiencies of present practices." Id. at 144.

And he said more specifically that the need for early appointment of counsel

> "is a twofold one, one to give the lawyer adequate time to prepare for trial, and also to give the defendant a representative during the time of the preliminary hearing." Id. at 145.

The House Committee Report spoke of

> "guaranteeing counsel at every stage of the proceedings, commencing with the initial appearance before the commissioner . . . It insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest." H.R. Rep. No. 364, 88th Cong., 1st Sess. 7 (1963).

The Committee members were aware that lack of counsel at the preliminary hearing was likely to subject convictions to constitutional challenge. As Representative Moore of West Virginia said: "if we do not give this right in the first instance, [it] could be very well raised and be fatal to any trial that may have taken place." Hearings on H.R. 1027, Before

Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., Ser. 3, at 86 (1963).

The need for counsel to be made available to indigent defendants at the Commissioner level had already been spoken to by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. Indeed, the Committee urged that counsel be appointed even prior to the preliminary hearing:

> "The Committee strongly believes that the interests of the financially disadvantaged accused and the demands of orderly procedure at the preliminary stages require that counsel be appointed for the accused not later than at his first appearance before the U.S. Commissioner." Poverty and the Administration of Federal Criminal Justice 37-38 (1963).

The passage of The District of Columbia Legal Aid Act in 1960 and of the Criminal Justice Act in 1964, in conjunction with the amendment in 1966 of Rule 5(b) of the Federal Rules of Criminal Procedure, see p. 12 , supra, have enabled questions relating to the absence of counsel at preliminary hearings in federal courts to be decided on other than constitutional grounds. See Part I section A, supra.

But the constitutional issue has been raised on collateral attack in two recent cases before this Court. Nance v. United States, 123 U.S. App. D.C. 239, 359 F.2d 273 (1966) and Brooks v. United States, No. 20,239 (D.C. Cir. Jan. 5 1967). In Nance, the Court held that

> "there is no constitutional right to counsel at preliminary examination which must be given retrospective application in the form of collateral attack on a final judgment, at the instance of a defendant who made no representation of indigency, and whose claim of prejudice from lack of counsel lies in his making of a voluntary statement not elicited by questions of Government officials." 123 U.S. App. D.C. at 291, 359 F.2d at 275.

Appellant submits that the qualifications the Court was careful to add in declining to vacate Nance's conviction leave open the question whether there is, in fact, a constitutional right to counsel at the preliminary hearing in this jurisdiction.

Nance's language concerning collateral attack and retrospective application will be considered infra, Part III. Nance and Brooks* are distinguishable from the instant case on other grounds given as qualification for denying relief in Nance. In Nance, the Court said that the right to counsel would not be applied ". . . at the instance of a defendant who made no representation of indigency". (Emphasis supplied.) In Brooks, the government argued, inter alia, that the case fell within the ambit of Nance in part because: "The records and files demonstrated that [Brooks] was financially able to retain counsel for trial and pay the premium for a $3,500 pretrial bond. We submit that he was not indigent when he appeared before the magistrate." Brief for appellee at 13-14. In the instant case, appellant's indigency has not been questioned at any stage of the proceeding. See p. 32 , infra. Moreover, appellant respectfully refers the Court's attention to the language there quoted from Miranda v. Arizona, 384 U.S. 436 (1966), to the effect that where there is any doubt as to the defendant's indigency, he must be told of his right to appointed counsel.

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*In Brooks v. United States, No. 20,239 (D.C. Cir. Jan. 5, 1967) this Court affirmed the lower court's denial of a habeas corpus petition by order, without opinion but citing Nance.

Nance and Brooks are distinguishable from the instant case on another ground. In Brooks, the defendant did not cross-examine or take the stand at the preliminary hearing. Brief for appellant at 6-7. In Nance the inculpatory statement at preliminary hearing arose during cross-examination by the defendant. Thus in neither of those cases were damaging statements "elicited by questions of Government officials." In the instant case, however, the statement volunteered by appellant was so qualified as to be harmless (Tr. 114) and it was not until he was cross-examined by the prosecuting attorney that damaging statements were "elicited" (Tr. 115). See p. 40 , infra.

Appellant submits that it would be incongruous for this Court to hold that the preliminary hearing is not a critical stage in view of its efforts since 1964 to make the hearing a meaningful part of pretrial criminal procedure. As the Court pointed out in Holmes v. United States, U.S. App. D.C. , , 370 F.2d 209, 210 (1966): "We have made it very clear that an effective preliminary hearing is one of the important rights of a defendant charged with crime . . . " See also, Washington v. Clemmer, 119 U.S. App. D.C. 216, 219, 339 F.2d 715, 718 (1964) (accused may obtain subpoenas to compel the attendance of "material witnesses reasonably requested"); (Dancy v. United States, 124 U.S. App. D.C. 58, 361. F.2d 75 (1966) (right to counsel); Ross v. Sirica, No. 20,535 (D.C. Cir., Jan. 23, 1967), petition for rehearing en banc denied (March 24, 1967) (granting mandamus to compel reopening of preliminary hearing at which additional witnesses could be called). The

effect of these opinions has been at once to recognize and enhance the preliminary hearing as a critical stage in the criminal process at which the accused needs the assistance of counsel.

The critical nature of the preliminary hearing was foreshadowed by earlier opinions of this Court. The principal case on which the Court relied in Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964), was Wood v. United States, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942). In that case, appellants argued that their convictions should be reversed because guilty pleas made before the committing magistrate were introduced into evidence at trial. The Court did not reach the question of right to counsel in its holding, since it reversed the conviction on self-incrimination grounds. But, referring to the preliminary hearing, the Court added:

> "The inquiry is essentially judicial. The subject matter is temporary restraint of the accused person's liberty. The function is to determine whether there is sufficient evidence to justify this. Commitment without evidence or on insufficient evidence would be arbitrary. The hearing, though informal, is in open court. It is not a Star Chamber affair. The court has power to examine the accused and others. The decision requires the exercise of discretion on both facts and law. . . .
> . . . In subject matter and function, the hearing is judicial. It should be so in essential procedure." 75 U.S. App. D.C. at 279, 280, 128 F.2d at 270, 271 (footnote omitted).

Referring to Johnson v. Zerbst, 304 U.S. 458 (1938), and Powell v. Alabama, 287 U.S. 45 (1932), the Court said in Wood:

> "They involved the right to counsel. But the same words apply to the privilege [against self-incrimination]. The two protections are therefore, and because of their substantive affinity, coextensive in time. The period of protection includes time for adequate preparation. It extends to 'every step in the proceedings against' the accused. The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial.
>
> For the same reasons the accused is entitled to have counsel at the hearing." Id. (Footnotes omitted; emphasis supplied.)

Despite this directive in Wood, the later decision in Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F.2d 22, cert. denied, 338 U.S. 880 (1949), asserted that there was no Sixth Amendment right to counsel at the preliminary hearing. Like Wood, that case arose prior to the enactment of Rule 5 of the Federal Rules of Criminal Procedure and the Court's decision may have been influenced in part by its assertion that "The preliminary hearing is not a trial within the meaning of the Constitution but it is an ex parte proceeding." 85 U.S. App. D.C. at 75, 177 F.2d at 23. Whether or not that fairly stated the picture prior to Rule 5(c), it certainly does not comport with 5(c)'s statement that "The defendant may cross-examine witnesses against him and introduce evidence in his own behalf." Moreover, all that happened in the preliminary hearing in Council was that the accused pleaded not guilty, and the Court concluded that "Nothing of substance prejudicial to a defendant occurs upon the making of that plea." 85 U.S. App. D.C. at 76, 177 F.2d at 24.

The authority of Council has been severely diminished by recent cases in this Court. In McGill v. United States, 121 U.S. App. D.C. 179,

180 - 181, 343 F.2d 791, 792-93 (1965) the Court said of Council:

> "The decision involved, rendered fifteen years ago, lies in a domain of jurisprudence which has been the subject of fresh consideration by the courts. The scope of constitutional requirements has been redefined in the light of changing conditions, and the increasing awareness of the underlying needs of a democratic society devoted to the pursuit of equal justice for all under law."

See also Anderson v. United States, 122 U.S. App. D.C. 277, 278, 352 F.2d 945, 946 (1965) ("It is now clear, the dictum in Council v. Clemmer [citation omitted] to the contrary notwithstanding that the assistance of counsel is required 'at every step in the proceedings.'")

The issue of right to counsel at preliminary hearing was raised on appeal in Moon v. United States, 115 U.S. App. D.C. 133, 317 F.2d 544 (1962) and in Headen v. United States, 115 U.S. App. D.C. 81, 317 F.2d 145 (1963). In neither case did this Court find that appellant's constitutional rights had been violated by the absence of counsel. But, with respect, appellant points out that those decisions were reached prior to the line of cases in this jurisdiction which began with Washington v. Clemmer, supra, and Blue v. United States, supra; prior to decisions of the Supreme Court requiring that the accused be told of his right to have counsel appointed even before his appearance before the committing magistrate, see p. 13 , supra; and prior to the passage of the Criminal Justice Act of 1964 which reemphasized Congressional concern that counsel be appointed before the U.S. Commissioner, see p. 17 , supra. They were also decided prior to the hearing in the instant case.

There is no accord among the other circuits as to whether the preliminary hearing is a "critical stage" to which the right to counsel attaches. In Pearce v. Cox, 354 F.2d 384, 390 (10th Cir. 1965), the court said:

> "We hold that the preliminary examination, from the arraignment of the defendant until the end of the examination, is a critical stage of the criminal proceedings against the defendant. This, because a defendant needs the advice and assistance of counsel . . . as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination . . . "*

In Sigler v. Bird, 354 F.2d 694 (8th Cir. 1966), the Eighth Circuit found the preliminary hearing to be a critical stage at which lack of counsel prejudiced the accused in violation of his constitutional rights. In Alden v. Montana, 234 F. Supp. 661 (D. Mont. 1964), aff'd, 345, F.2d 530 (9th Cir. 1965), the court granted habeas corpus after finding that prejudice in fact resulted from lack of counsel at petitioner's preliminary hearing. The court pointed out, however, that Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S. 59 (1963)

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*In the cases consolidated for decision on that appeal, the court reviewed the facts adduced at the hearings on the petitions for writs of habeas corpus. In six of the appeals the cases were remanded for further proceedings to determine whether appellants had in fact been prejudiced by what occurred during the preliminary proceedings. In the remaining thirteen cases, after reviewing the evidence at the hearings below, the court affirmed the finding that petitioners had not been prejudiced by lack of counsel at the preliminary hearing.

> "make it clear that this right to counsel exists at all stages of the proceedings, and particularly at the preliminary hearing before the magistrate . . .
>
> . . . in setting aside the convictions in both cases, the Supreme Court made it very clear that a showing of prejudice by the absence of counsel at the preliminary hearing was not necessary in order for the absence of counsel to be violative of due process requirements." 234 F. Supp. at 670-71.

A contrary view was taken by the majority in Chester v. California, 355 F.2d 778 (9th Cir. 1966) which held that since the defendant did not incriminate himself and was not otherwise disadvantaged while without counsel at the preliminary hearing, the hearing "was not a critical stage of the criminal proceeding." Id. at 780. But as Judge Browning pointed out in his opinion (concurring in part, dissenting in part), there are difficulties in "suggesting that the existence of the Sixth Amendment right to counsel (as distinguished from the availability of a particular remedy for its denial) is conditioned upon a showing of possible specific prejudice from the absence of counsel at a pretrial confrontation." Id. at 786. He argued that the "preliminary examination was part of the accusatory process, the nature of the proceeding was such that the assistance of counsel was necessary to protect appellant's interests, and appellant therefore had a right to counsel under the Sixth Amendment." Id. at 785-86. He would have remanded the case for a hearing on the issue of prejudice.

The confusion of the issue of prejudice with the right to counsel, noted in Judge Browning's opinion, accounts for a number of federal appellate

decisions containing language to the effect that the preliminary hearing is not a "critical stage". See, e.g., DeToro v. Pepersack, 332,F.2d 341 (4th Cir.) cert denied, 379 U.S. 909 (1964); Cooper v. Reincke, 333 F.2d 603(2d Cir.) cert. denied, 379 U.S. 909 (1964); Lathram v. Crouse, 320 F.2d 120 (10th Cir. 1963).

But these opinions should not be followed here for two reasons. First, they tend to confuse right with remedy. Second, at least since 1964 the preliminary hearing has played a more vital role in pretrial criminal procedure in this jurisdiction than it has done in other federal jurisdictions. See p. 20 , supra. See also United States v. Motte, 251 F. Supp. 601, 605 n.3 (S.D.N.Y. 1966), where the court distinguishes the law in the District of Columbia from that in other federal courts.

D. The facts in this case demonstrate the critical nature of the preliminary hearing and the need for the assistance of counsel

It is suggested above that the preliminary hearing is always a critical stage at which the accused has the right to counsel. But if it is deemed necessary to determine this on a case-by-case basis, the facts in the instant case demonstrate the critical nature of the hearing and the need for the advice of counsel.

Counsel would have advised appellant against taking the stand in the posture presented by this case at the preliminary hearing.* A prima facie

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*Some defense counsel are of the opinion that "the defendant should never be put on the stand in a preliminary hearing. . . " Georgetown Legal Internship Program, The Preliminary Hearing in the District of Columbia, A Manual for the Defense Attorney 39 (1967).

case had already been established by the close of the government's case. See C.D. No. 13 Case No. 30. Without counsel, appellant would not know that the government's burden is more easily met (and properly so) at the preliminary hearing than at trial, and that there was no point in his attempt to controvert the police officer's testimony.

Apparently appellant "asked a question or two" of the government witness. (Tr. 121; see also Tr. 111) The record does not reveal what those questions were, but it may be assumed that they did not probe the government's case as cross-examination by counsel would have done. Discovery was therefore very limited and in any case was not available to trial counsel since appellant did not insist, as counsel would have done, on the hearing's being recorded. Thus testimony was not preserved while events were still fresh in the witness' mind. Cf. Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 372 (1960) (preliminary hearing testimony may be used to refresh witness' recollection at trial, and, if necessary, to impeach him).

The Commissioner testified at trial that he informed appellant "that he had a right not to testify, and if he did the testimony could be used against him, at that or any other hearing." (Tr. 112) Despite this admonition, appellant chose to testify, apparently believing that he could testify solely in behalf of his co-defendant. According to the Commissioner: "I repeated to Mr. Ware of his rights to refrain from testifying, he had a constitutional right to remain silent in the matter, and then Mr. Ware said that he actually wanted to take the stand to testify strictly on behalf of his

co-defendant Powell." (Tr. 112) The docket entry is to the same effect: "Def. Ware - after two additional warnings in re his Constitutional rights choice (sic) to testify solely as a witness for co-def. - Powell." C.D. No. 13 Case No. 30. Appellant needed the advice of counsel that the use of his testimony could not be so limited.

Moreover, it is possible that, despite the Commissioner's warning, appellant was unaware that a statement could be used against him at trial for quite different reasons. The Commissioner testified that he warned appellant "the testimony could be used against him at that or any other hearing." (Tr. 112; emphasis supplied.) Appellant may have assumed the warning applied only to hearings and not to the trial, particularly since it was apparent that no transcript was being made of the testimony.

Counsel might have suggested that conflicting interests of the two defendants at least required separate counsel. As it was, counsel was available in neither case and in a hopeless effort to help his co-defendant, appellant made damaging admissions against his own interest.

Appellant submits that his experience in this case illustrates the critical nature of the hearing and the fact that representation by counsel is essential if the hearing is to be conducted fairly, especially where, as here, the defendant takes the stand.

II

LACK OF COUNSEL AT THE PRELIMINARY HEARING DEPRIVED APPELLANT OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT BECAUSE HE WAS DISCRIMINATED AGAINST ON THE BASIS OF POVERTY

Although the case was decided on other grounds, this Court pointed out in Ricks v. United States, 118 U.S. App. D.C. 216, 219 n.2, 334 F.2d 964, 967 n.2 (1964) that if Rule 5(b) of the Federal Rules of Criminal Procedure

> "is construed to establish a right only 'to retain counsel' for the preliminary hearing, then the question arises whether there is an 'invidious discrimination' between defendants who can afford to retain counsel and those who cannot." (Emphasis in original; citations omitted.)

In support of this proposition, Ricks cited Griffin v. Illinois, 351 U.S. 12 (1956), which held that

> "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons . . .
>
> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Id. at 17.

The instant case raises just the point that the Court foresaw in Ricks.* On voir dire examination at trial, the Commissioner testified:

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*The point had also been raised by appellate counsel in Moon v. United States, 115 U.S. App. D.C. 133, 134, 317 F.2d 544, 545 (1962): the Court noted that it was "an important and novel point", and the affirmance seems to have rested largely on the failure to raise it below.

"I advised him of his right to retain the services of a lawyer." (Tr. 107; emphasis supplied.) This is borne out by the docket entry which states: "Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel" at the initial presentment. C.D. No. 13 Case No. 30 (1964) (emphasis supplied). Nothing in the record indicates that appellant was informed or knew Legal Aid counsel could be assigned if he were without funds.

After the date of the preliminary hearing in the instant case, and after the decision in Ricks, Rule 5(b) of the Federal Rules of Criminal Procedure was changed to require the Commissioner to inform the defendant not only of his right to retain counsel, but also "of his right to request the assignment of counsel if he is unable to obtain counsel." Rule 44(a) was changed to specify that the right to assignment of counsel begins with the "initial appearance before the commissioner". The Advisory Committee's notes to these amendments emphasize the right to counsel. But appellant submits that, quite apart from the Sixth Amendment, the Rules would have required revision along the same lines, in order to fulfil the requirement of equal protection.

The equal protection argument was recognized by the Court of Appeals for the Ninth Circuit in Chester v. California, 355 F.2d 778 (9th Cir. 1966). There the court pointed out that under California law

> "an accused was entitled to be represented by counsel at his preliminary examination, and to be advised of that right. Had there been any allegation that these rights were with held from Chester because of his poverty, we might have an equal protection question such as was presented in Griffin v. People of State of Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891. But there is no such allegation. Nor is there anything in the record to indicate that Chester was, because of poverty, dealt with differently than defendants who were able to employ counsel." Id. at 781 n. 1.

Speaking of an even earlier stage in the accusatory process, the Supreme Court has recently emphasized the need to inform defendants not only of their right to counsel but also of their right to have counsel appointed if they are without funds. In Miranda v. Arizona, 334 U.S. 436 (1966), the Court held:

> "The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon v. Wainwright [citation omitted] and Douglas v. California [citation omitted]". Id. at 472-73.

Appellant submits that "denial of counsel to the indigent" at the time of preliminary hearing "while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation" at the police interrogation stage.

Miranda also emphasized the need to give explicit advice that

an attorney will be appointed:

> "In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. . . . As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it." 384 U.S. at 473 (citations omitted).

In the instant case, appellant's indigency has not been disputed. He was unable to make the $2500 bond set at initial presentment and again after the preliminary hearing and in both instances was committed to D.C. Jail. C.D. No. 13 Case No. 80. Nor has he made bond since that time. Both at trial and on appeal he was represented by appointed counsel. All judicial proceedings have been in forma pauperis. Should the issue of indigency be disputed, it could be resolved at a hearing. But, as was pointed out in Miranda: "the expedient of giving a warning is too simple and the rights involved [are] too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score." 384 U.S. at 473 n. 43.

Last year, this Court again emphasized that the right to counsel should not depend on whether the accused has the financial ability to retain counsel. Tate v. United States, 123 U.S. App. D.C. 261, 263, 359 F.2d 245, 252 (1966) pointed out:

> "This court has the function and responsibility of exercising supervisory powers to the end of obtaining fair administration of criminal justice within the District of Columbia. The Supreme Court outlined our duties in the exercise of that supervisory power in Griffin v. United States, 336 U.S. 704, 69 S. Ct. 814, 93 L. Ed. 993 (1949), and Fisher v. United States, 328 U.S. 463, 476, 66 S. Ct. 1318, 90 L. Ed. 1382 (1946). That responsibility has called forth significant rulings of this court relating to right to counsel." (citations omitted.)

Though Tate was concerned with representation of indigents seeking to appeal cases from the United States Branch of the D.C. Court of General Sessions, its broad language is equally applicable to representation of indigents at an earlier stage in judicial proceedings:

> "Absolute equality is perhaps impossible in the context of the limited facilities of the local courts. Nevertheless, equal justice remains a meaningful goal, with our practical task being the minimizing, if not eliminating, of financial resources as a weight in the scales of criminal justice." (citations omitted). 123 U.S. App. D.C. at 268-69, 359 F.2d at 252-53.

In McGill v. United States, 121 U.S. App. D.C. 179, 182, 348 F.2d 791, 794 (1965), the Court said: "The District of Columbia is unique in the lead it has taken in quest of equal justice for all." Appellant submits that he was denied "equal justice" in this case because he was told only of his right to retain counsel, and being without funds, he submitted to a preliminary hearing without the assistance of counsel.

III

VIOLATION OF APPELLANT'S RIGHTS WARRANTS RELIEF ON COLLATERAL ATTACK

A. Allegations of denial of the right to counsel and of the equal protection of the laws may be inquired into by habeas corpus

It is well settled that allegations of denial of constitutional rights, including the rights to equal protection and to counsel at trial, render a conviction subject to collateral attack by habeas corpus. See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); United States ex rel Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962) (equal protection); United States ex rel Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959) (equal protection).

The right to counsel at preliminary hearing has frequently been litigated on collateral attack. Although some courts have held that the hearing was not a critical stage, and others that there was insufficient evidence of prejudice to vacate the sentence, it has been generally assumed that the issue may properly be aired on collateral attack. See, e.g., DeToro v. Pepersack, 332 F.2d 341, 344 (4th Cir,) cert. denied, 379 U.S. 909 (1964); Cooper v. Reincke, 333 F.2d 608 (2d Cir.), cert. denied, 379 U.S. 909 (1964); Gallegos v. Cox, 341 F.2d 107 (10th Cir.) cert. denied, 381 U.S. 918 (1965). In Robbins v. United States, 345 F.2d 930 (9th Cir. 1965), the Ninth Circuit held that the issue of violation of the right to counsel at the preliminary hearing is better inquired into on collateral attack than on direct appeal:

> "The Government is entitled to present proof as to just what did occur before the Commissioner. Before we are asked to reverse the District Court, that court is entitled to an opportunity to consider, in the light of the facts fully developed, whether the point has merit. If and when the District Court, presented with such an opportunity, rules against Robbins and an appeal therefrom is taken to this court, we are entitled to have the findings of the District Court on any disputed questions of fact relevant to the issue." Id. at 932.

But in Nance v. United States, 123 U.S. App. D.C. 289, 291, 359 F.2d 273, 275 (1966) this Court said that

> "there is no constitutional right of counsel at preliminary examination which must be given retrospective application, in the form of collateral attack on a final judgment, at the instance of a defendant who made no representation of indigency, and whose claim of prejudice from lack of counsel lies in his making of a voluntary statement not elicited by questions of Government officials." (emphasis supplied.)

Appellant has argued, supra, p. 19, that the underlined phrase was sufficiently qualified in ways that are distinguishable from the instant case so that the Court's ruling in Nance is not determinative here. Appellant has also distinguished the facts in Brooks v. United States, No. 20,239 (D.C. Cir., Jan. 5, 1967), supra, p. 19. In Brooks, the Court, without opinion, cited Nance in affirming by Order the District Court's denial of habeas corpus petition.*

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*In the instant case, the government, in its Return and Answer to Rule to Show Cause, filed in the court below, claimed that "Where a prisoner challenges a detention pursuant to a criminal conviction in a Federal court, 28 U.S.C. §2255 makes habeas corpus unavailable." The Court did not so rule in Brooks and appellant points out that in the instant case it would make no difference whether the issue is litigated by motion under 28 U.S.C. §2255 or by way of habeas corpus since in either case it would be heard in this jurisdiction. Thus there would be no purpose in requiring the case to be brought again under 28 U.S.C. §2255. Cf. United States v. Hayman, 342 U.S. 205, 219 (1952); Fay v. Noia, 372 U.S. 391, 409 (1963). Appellant therefore urges that the Court treat the instant case as being properly before it on the merits on an appeal from a denial of petition for a writ of habeas corpus, or alternatively, that it treat the appeal as if it were from a denial of a motion filed under 28 U.S.C. §2255.

B. Denial of the right to counsel at preliminary hearing is "so basic to a fair trial that its infraction can never be treated as harmless error"

Appellant has argued in Part I of this brief that the preliminary hearing is a "critical stage" in the accusatory process, at which the right to counsel attaches. The question remains: what degree of prejudice, if any, must be shown in order to require vacating a conviction where the right to counsel was denied at the preliminary hearing.

In Chapman v. California, 386 U.S. 18 (February 20, 1967), the Supreme Court laid down a rule of harmless error for constitutional cases, a rule which will be considered more fully in the next section of this brief. But in dictum the Court also recognized that its prior decisions indicated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error", citing Gideon v. Wainwright, 372 U.S. 335 (1963), a right to counsel case. Id. at 23. On this point there seems to be no difference between the majority opinion in Chapman and the concurring opinion of Justice Stewart. Justice Stewart would have reversed without looking to see whether the error was in fact harmless. He pointed out that in right to counsel cases, including right to counsel before trial, the Court had formerly been careful not to consider whether prejudice resulted from lack of counsel:

> "When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Glasser v. United States, 315 U.S. 60, 76. That, indeed, was the whole point of Gideon v. Wainwright, 372 U.S. 335, overruling Betts v. Brady, 316 U.S. 455. Even before trial, when counsel has not been provided at a critical stage 'we do not stop to determine whether prejudice resulted.' Hamilton v. Alabama, 368 U.S. 52, 55; White v. Maryland, 373 U.S. 59, 60." Id. at 43.

It is not altogether clear that the same standard applies on collateral attack as on direct appeal. See Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961). Judge Friendly there suggested that more serious prejudice might be required in order to vacate a conviction than would have been required to reverse. But he also said:

> "the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal or, where other requirements are met, the vacating of a sentence, is in some degree a function of the gravity of the act or omission; the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play. At one end of the range is the case where the defendant has simply, although excusably, not had the benefit of evidence that has later become available to him; . . . At the other end of the range is the case of a defendant being obliged to plead to a capital charge without benefit of counsel; there the court 'does not stop to inquire whether prejudice results.' Hamilton v. State of Alabama, 82 S. Ct. 157, 159 (1961). As Mr. Justice Douglas there noted, it is normally not feasible in such cases to determine whether prejudice occurred. However, as we read Hamilton, the Court would not decide differently in the face of the most convincing evidence that under no circumstances could counsel have assisted; in such cases the violation of basic concepts is such that the requirement of a showing of prejudice drops to zero." Id. at 514.

Appellant asserts, however, that the discussion in Chapman is properly applicable in the instant case.

C. In the alternative, the government has the burden of proving beyond a reasonable doubt that denial of appellant's constitutional rights constituted "harmless error"

If the Court holds that the right to counsel at the preliminary hearing is not "so basic to a fair trial that [its] infraction" necessarily requires vacating a conviction on collateral attack, then appellant urges that the Court apply the "harmless error" test of Chapman v. California, 386 U.S. 18 (February 20, 1967). There the Supreme Court placed on the prosecution the burden of showing, and of showing beyond a reasonable doubt, that the constitutional error complained of was harmless:

> "There is little, if any, difference between our statement in Fahy v. Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Id. at 24; emphasis supplied.)

In Chapman, the Court had no doubt that the error complained of, namely prosecution comment on failure of the accused to take the stand, was not harmless, and the conviction was reversed.

While the rule in Chapman may place a more stringent burden on the government than has previously been the case, earlier decisions of this Court are in keeping with Chapman in that they did not put the burden on the accused of showing that he was actually prejudiced by denial of his

constitutional rights. Thus in Shelton v. United States, 120 U.S. App. D.C. 65, 66, 343 F.2d 347, 348, cert. denied, 382 U.S. 856 (1965), the Court said "we can find no basis in the record for an informed speculation" that appellant's rights were prejudicially affected. In Anderson v. United States, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965), the Court declined to reverse in a case where "the record affirmatively shows that no prejudice resulted from the plea of not guilty without counsel at arraignment." In McGill v. United States, 121 U.S. App. D.C. 179, 181, 348 F.2d 791, 793 (1965), the standard for reversal was said to be whether the defendant had been at least exposed to a reasonable possibility of prejudice in fact" resulting from lack of counsel at a preliminary proceeding.

D. This Court may either vacate the conviction on the record now before it or remand the case for an evidentiary hearing.

If the Court holds that appellant's right to counsel at the preliminary hearing was violated and that it need not inquire into the possibility of prejudice, Part III section B, supra, then the record now before the Court is adequate to require vacating the conviction, Though no hearing was held on the habeas corpus petition, the Commissioner's Record of Proceedings and the voir dire examination of the Commissioner and of appellant at trial establish the facts concerning the deprivation of the right to counsel, see pp. 27-28, supra.

Appellant contends that the present state of the record is also adequate to permit vacating the conviction should the Court believe it necessary to inquire into the issue of prejudice, see Part III section C,

supra. The facts already of record, discussed in Part I section D, supra, show that appellant was disadvantaged by the lack of counsel at preliminary hearing. Appellant submits that the government would not be able to show beyond a reasonable doubt that its successful conduct of the prosecution was not assisted by the violation of defendant's right to counsel at the preliminary hearing. Cf. Black v. United States, 385 U.S. 26 (1966). Similarly, appellant contends, the record is adequate for the Court to make an "informed speculation" that appellant has been prejudiced. See Shelton v. United States, 120 U.S. App. D.C. 65, 66, 343 F.2d 347, 348, cert. denied, 382 U.S. 956 (1965).

As a result of the government, but not appellant, being represented by counsel at the preliminary hearing, the government had an unfair advantage in the preparation of its case.

Appellant has contended that he took the stand in the hope of making an exculpatory statement on behalf of his co-defendant Powell. The Commissioner testified that "in substance the sum total of his statement" was that "as far as any passing of money was concerned to Mr. Powell, he didn't recall that such a thing took place, but if it did take place, that Powell didn't know anything about the sale that was involved, and that if he did it, it could have been strictly as a matter of convenience." (Tr. 114) It was not until the government's questions on cross-examination that appellant made damaging admissions. (Tr. 114-15) There was no transcript or verbatim record of the hearing and only the statement on direct, not the more damaging admissions on cross-examination, were

recorded in the Commissioner's Record of Proceedings. See C.D. No. 13 Case No. 79 and Case No. 80.* In fact defense counsel did not learn of the admissions until the day preceding trial. (Tr. 4) The government, on the other hand, had the benefit of the statements throughout its preparation of the case. The trial transcript indicates defense counsel's lack of information as to the relationship between appellant and his co-defendant Powell at the preliminary hearing,** and contrasts with the government's knowledge of the case. (Tr. 43-44) That knowledge was presumably based, at least in part, on its information from the preliminary hearing. At one point, out of the jury's presence, the prosecutor remarked: "Powell and Ware were working together. Powell was selling Ware's stuff, and we have that in Ware's statement." (Tr. 44 emphasis supplied) Presumably he was referring to the preliminary hearing.

The government had originally intended to use the statements as part of its case in chief, by calling the U.S. Commissioner to testify to what appellant had said at the preliminary hearing. (Tr. 95-96) Because of concern as to whether the statements were admissible, having been obtained in the absence of counsel, the goverment after lengthy

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*The Commissioner has the duty of recording "all official proceedings taken by or before him" in the Commissioner's Docket. Manual for United States Commissioners 2 (1943). But he is not required, and could not be expected, to prepare his own verbatim transcript of the hearing for inclusion in the Docket entry.

**Wade and Powell were not tried together. (See Tr. 43)

argument and prior to the trial judge's deciding whether or not they were admissible, declined to use them. (Tr. 143) The judge did not rule, and was not asked to rule on whether the statements could be used to impeach appellant, should he take the stand. In his pro se petition for habeas corpus, appellant alleged that, under the circumstances set forth therein, "I was stripped of my defence of innocence befor I arrived for trial."

It was pointed out in Part I Section D, supra, that defense counsel may have been hampered in his cross-examination of the principal government witness at trial. Unlike the government, he had not had the opportunity to examine the witness previously at the preliminary hearing. Moreover there was no opportunity to compare the witness' recollection at trial, after a lapse of nine months, with his statement at the preliminary hearing, which was held two weeks after the event.

Under the "harmless error" standard, the government has the burden of showing beyond a reasonable doubt that appellant was not harmed by violation of his constitutional right to counsel at preliminary hearing. The government's answer below was limited to arguing that appellant should have proceeded by way of motion under 28 U.S.C. §2255 rather than habeas corpus. It did not respond on the merits.

Appellant has argued that the present record is adequate for the Court to vacate the conviction. Should the Court hold otherwise, the case should be remanded for an evidentiary hearing at which the government will have the opportunity to prove beyond a reasonable doubt that appellant

was not harmed by denial of his constitutional right to counsel at the preliminary hearing.

Appellant's petition was denied by the court below without a hearing, findings of fact or conclusions of law. Unless the record clearly showed that petitioner was not entitled to relief, then a hearing should have been held to determine disputed questions of fact and to provide the appellate court with a record for review. In the instant case, because of the voir dire examination at trial more information is available than would generally be the case without a hearing. But this information principally relates to the question of what occurred at the preliminary hearing. It does not fully explore the question of prejudice. Generally, appellate courts reviewing on collateral attack the question of denial of counsel at the preliminary hearing have done so on the basis of a hearing held in the court below. See, e.g., Nance v. United States, 123 U.S. App. D.C. 239, 359 F.2d 273 (1966); DeToro v. Pepersack, 332 F.2d 341 (4th Cir.), cert. denied, 379 U.S. 909 (1964); Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976 (1966). In Holmes v. United States, U.S. App. D.C. , 370 F.2d 209 (1966), this Court remanded a case for a hearing as to what had occurred concerning the preliminary hearing. The Court said:

> "Appellant's motion [to dismiss indictment or for alternative relief] was denied without an evidentiary hearing of any kind.
>
> We think an evidentiary hearing should have been conducted to determine whether the allegations in appellant's motion were well founded." 370 F.2d at 210 (footnote omitted).

If the Court declines to vacate the conviction on the record before it, appellant respectfully requests that the case be remanded for an evidentiary hearing in the District Court.

E. Relief should be granted on collateral attack even if the Court rules that appellant's statutory rather than constitutional rights were violated

Appellant has argued, Part I section A. infra, that his statutory right to counsel under The District of Columbia Legal Aid Act, 2 D.C. Code §§2201-10, enacted by Congress in 1960, was violated in the instant case.

Habeas corpus properly lies to "redress detentions in violation of fundamental law" as well as clearly unconstitutional detentions. In Fay v. Noia, 372 U.S. 391, 412 (1963), the Supreme Court noted:

> "Although the remedy extends to federal prisoners held in violation of federal law and not merely of the Federal Constitution, many cases have denied relief upon allegations merely of error of law and not of a substantial constitutional denial [citations omitted]. Such decisions are not however authorities against applications which invoke the historic office of the Great Writ to redress detentions in violation of fundamental law."

And see Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), in which Judge Friendly stated:

> "Section 2255 is not limited to cases where the sentence was imposed 'in violation of the Constitution or laws of the United States," but includes the more general phrase 'or is otherwise subject to collateral attack,' the boundaries of which have not been defined, save, of course, that 'mere error' is not enough." Id. at 511 n.1.

Cf. Escoe v. Zerbst, 295 U.S. 490 (1935); Poole v. United States, 102 U.S. App. D.C. 71, 75-76, 250 F.2d 396, 400-01 (1957).

Appellant submits that the right to counsel at a critical stage in a criminal prosecution is part of the "fundamental law" of this jurisdiction. Whether that law is to be found in the United States Constitution, or in a federal statute, making it unnecessary to reach the constitutional issue, the right to counsel claim is properly raised on collateral attack.

F. Relief is not barred by application of the principle that some constitutional rights need not be given retroactive application

Problems of retroactive application of a newly-declared constitutional right are not present in the instant case.

The issue does not arise if the Court finds that appellant's right to counsel under The District of Columbia Legal Aid Act, 2 D.C. Code §§2201-10, was violated. That statute was enacted in 1960, and appellant's hearing was held in 1964. The statute was construed to require that an accused be informed of his right to appointed counsel at the preliminary hearing in Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944 (1965). The hearing in the instant case was held after waiver of the hearing in Blue, but before the decision in that case.* In this, as in other respects, see p. 19 , supra, the

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*The hearing in the instant case held held on May 12, 1964, C.D. No. 13 Case No. 80, and the trial began on January 28, 1965. The hearing in Blue was waived on March 18, 1963. Commissioner's Record of Proceedings, Crim. Case No. 365-63. The decision in Blue was handed down on October 29, 1964.

instant case is distinguishable from Nance v. United States, 123 U.S. App. D.C. 239, 359 F.2d 273 (1966) and Brooks v. United States, No. 20,239 (D.C. Cir. Jan. 5, 1967).*

Should the Court decline to grant relief under the statute and instead reach the constitutional issue, problems of retroactivity still will not be presented in this case. This Court has not yet held that there is a constitutional right to counsel at the preliminary hearing. If and when it so holds, the litigants in that case will be the "chance beneficiaries" of the "new rule." See Stovall v. Denno, 87 S. Ct. 1967, 1972 (June 12, 1967).** Appellant argues that the instant case is an appropriate one in which to enunciate the rule of constitutional right to counsel at the preliminary hearing. The question of retroactivity under the principles laid down in Stovall v. Denno, supra, would then be properly reserved to other cases which may be brought before this Court in the future.

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*The hearing in Nance was held on December 8, 1960, 123 U.S. App. D.C. at 291, 359 F.2d at 275. The hearing in Brooks was held in 1962. Commissioner's Record of Proceedings, Crim. Case No. 321-62.

**In Stovall, the Court said: "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." 87 S. Ct. at 1972 (footnotes omitted).

CONCLUSION

For the foregoing reasons, appellant respectfully prays that the decision of the District Court be reversed.

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(Appointed by this Court)
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Washington, D.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles F. Ware,
Appellant

v.

Paul H. Preston, etc., et al.

No. 20730

PETITION FOR REHEARING

Appellant respectfully petitions that the Court grant rehearing, in order that it may be ascertained upon which of the different bases urged by appellee for affirmance this Court's judgment without opinion rests.

The grounds for this petition are as follows:

1. Appellant Ware contemplates further proceedings in the Supreme Court or the District Court, and has requested counsel to pursue available remedies.

2. The basic question raised by appellant was whether there is a constitutional right to counsel at preliminary hearing. This is an issue of general importance which would be worthy of presentation in a petition for certiorari. However, if this Court's affirmance was predicated on a ground other than rejection of appellant's claim that such constitutional right exists, certiorari may not appear appropriate. An opinion on rehearing would enable the parties and the Supreme Court to evaluate whether the constitutional issue is ripe for certiorari.

3. The government's sole ground of opposition in the District Court to appellant's petition for habeas corpus, was that appellant had pursued the wrong remedy and should instead have petitioned under 28 U.S.C. §2255. The government advanced this same procedural ground as Point I of its two-point Argument for affirmance on appeal. (Brief for Appellee, Point I.) Appellant should be advised by means of an opinion on rehearing whether the affirmance was based on this procedural ground, in order that appellant may determine whether to file a new petition under §2255 in the District Court.

4. If the judgment of affirmance rests upon a holding that appellant failed to demonstrate prejudice upon the existing record, made upon his pro se petition below, an opinion on rehearing to this effect would guide the future course of appellant's litigation in the District Court.

Since the denial of a habeas corpus petition is not res judicata, appellant could seek upon a new petition to compile a fuller record on the issue of prejudice, e.g., by moving the District Court for production of the grand jury minutes to determine whether the indictment was based upon appellant's self-incriminatory testimony at the preliminary hearing. Alternatively, if failure to demonstrate prejudice is the basis for affirmance, appellant asks the Court on rehearing to vacate the judgment of affirmance and remand for an evidentiary hearing at which the opportunity to prove prejudice would be accorded. Appellant should not be permanently barred from relief for failure to show prejudice without ever having received a hearing at which (with the assistance of counsel) evidence on the issue could be presented.

5. In the present state of the record in this Court, appellant cannot ascertain whether the Supreme Court or the District Court is the proper forum for further seeking relief at this time.

WHEREFORE, appellant respectfully prays that this Court grant the petition for rehearing.

Respectfully submitted,

Patricia W. Weinberg

Patricia W. Weinberg
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(Appointed by this Court)
419 6th Street, N. W.
Washington, D. C.

CERTIFICATE OF GOOD FAITH

It is hereby certified that this petition is presented in good faith and not for purposes of delay.

Patricia W. Weinberg
Attorney for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing petition was hand delivered this 17th of October, 1967 to the Office of the United States Attorney for the District of Columbia, United States Courthouse, Washington, D.C.

Patricia W. Weinberg
Attorney for Appellant